JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

27 September 2006 *

In Case T-43/02,

Jungbunzlauer AG, established in Basle (Switzerland), represented by R. Bechtold, U. Soltész and M. Karl, lawyers,

applicant,

v

Commission of the European Communities, represented by P. Oliver, acting as Agent, and by H. Freund, lawyer,

defendant,

* Language of the case: German

supported by

Council of the European Union, represented by E. Karlsson and S. Marquardt, acting as Agents,

intervener,

APPLICATION for, primarily, annulment of Commission Decision 2002/742/EC of 5 December 2001 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/36.604 — Citric acid) (OJ 2002 L 239, p. 18) and, in the alternative, reduction in the fine imposed on the applicant by that decision,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of J. Azizi, President, M. Jaeger and F. Dehousse, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 24 May 2004,

gives the following

Judgment

Facts giving rise to the dispute

1 The applicant, Jungbunzlauer AG ('Jungbunzlauer' or 'the applicant'), was formed in 1993 as a wholly-owned subsidiary of Jungbunzlauer Holding AG, all of whose shares are in turn held by Montana AG ('the Jungbunzlauer group'). In the United States the group is represented by Jungbunzlauer International AG, a subsidiary of the Jungbunzlauer group. The head office of the group is at the offices of Jungbunzlauer in Basle (Switzerland). Before 1993 the group was managed by Jungbunzlauer GmbH, whose registered office was in Vienna (Austria).

2 The Jungbunzlauer group is engaged in the manufacture and marketing of ingredients used in the food and beverages industry, and the pharmaceutical and cosmetics industry, as well as for various other industrial applications. It is, inter alia, one of the world's leading manufacturers of citric acid.

3 Citric acid is the most widely used acidulant and preservative in the world. It exists in different types and is used in a variety of applications, including in food and beverages, household detergents and cleaners, pharmaceuticals and cosmetics, and in various industrial processes.

4 In 1995 total worldwide sales of citric acid were approximately EUR 894.72 million, including approximately EUR 323.69 million in the European Economic Area (EEA). In 1996 approximately 60% of the worldwide citric acid market was in the hands of the five addressees of the decision, which is the subject-matter of the present action, namely, in addition to Jungbunzlauer, F. Hoffmann-La Roche AG ('HLR'), Archer Daniels Midland Co. ('ADM'), Haarmann & Reimer Corporation ('H&R'), belonging to the Bayer AG group ('Bayer') and Cerestar Bioproducts BV ('Cerestar') (together referred to as 'the parties concerned').

5 In August 1995 the United States Department of Justice informed the Commission of an investigation into the citric acid market. Between October 1996 and June 1998 the parties concerned, including Jungbunzlauer International AG, pleaded guilty to taking part in a cartel. As a result of plea agreements with the Department of Justice, fines were imposed on the companies by the United States authorities. In addition, several individuals charged were personally fined. Investigations were also carried out in Canada and some of the same companies, including Jungbunzlauer International AG, were fined there.

6 On 6 August 1997 the Commission sent requests for information under Article 11 of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) to the four largest producers of citric acid in the Community, including Jungbunzlauer GmbH. In addition, in January 1998 the Commission sent requests for information to the main purchasers of citric acid in the Community and, in June and July 1998, it sent further requests for information to the main producers of citric acid in the Community.

7 Following receipt of the request for information which had been sent to it in July 1998, Cerestar contacted the Commission and, in the course of a meeting on

29 October 1998, expressed a wish to cooperate with the Commission under the Commission notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'). At the meeting Cerestar gave an oral account of the cartel activity in which it had been involved. On 25 March 1999 it sent the Commission a written statement confirming what it had said at the meeting.

8 By letter of 28 July 1998 the Commission sent Jungbunzlauer GmbH a further request for information to which the latter replied by letter of 28 September 1998.

9 At a meeting on 11 December 1998 ADM expressed its willingness to cooperate with the Commission and gave an oral account of the anti-competitive activity in which it had been involved. On 15 January 1999 it sent the Commission a written statement confirming that account.

10 On 3 March 1999 the Commission sent additional requests for information to HLR, Jungbunzlauer and Cerestar.

11 On 28 April, 21 May and 28 July 1999 respectively, Bayer, on behalf of H&R, the applicant and HLR, made statements on the basis of the Leniency Notice.

12 On 28 March 2000 the Commission, on the basis of the information supplied to it, sent a statement of objections to the applicant and the other parties concerned for

infringement of Article 81(1) EC and Article 53(1) of the EEA Agreement. The applicant and all the other parties concerned submitted written observations in response to the Commission's objections. None of the parties requested an oral hearing, nor did they substantially contest the facts as set out in the statement of objections.

13 In a letter of 11 April 2001 to the Commission, Jungbunzlauer GmbH made certain observations relating to the procedure under way.

14 On 27 July 2001 the Commission sent additional requests for information to the applicant and the other parties concerned. The applicant replied on its own behalf and that of Jungbunzlauer GmbH by letter of 3 August 2001.

15 On 5 December 2001 the Commission adopted Decision 2002/742/EC relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/36.604 — Citric acid) ('the Decision'). The applicant was notified of the Decision on 18 December 2001.

16 The Decision includes the following provisions:

'Article 1

[ADM], [Cerestar], [H&R], [HLR] and [the applicant] have infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating in a continuing agreement and/or concerted practice in the sector of citric acid.

The duration of the infringement was as follows:

— in the case of [ADM], [H&R], [HLR] and [the applicant]: from March 1991 to May 1995;

— in the case of [Cerestar]: from May 1992 to May 1995.

...

Article 3

The following fines are imposed on the undertakings referred to in Article 1 on account of the infringement described therein:

(a) [ADM]: EUR 39.69 million

(b) [Cerestar]: EUR 170 000

(c) [HLR]: EUR 63.5 million

(d) [H&R]: EUR 14.22 million

(e) [the applicant]: EUR 17.64 million.'

17 In recitals 80 to 84 of the Decision, the Commission stated that the cartel involved the allocation of specific sales quotas to each member and their adherence to those quotas, the fixing of target and/or floor prices, the elimination of price discounts and the exchange of specific customer information.

18 In recitals 185 to 188 of the Decision, the Commission found that, with regard to the Jungbunzlauer group, the infringement should be attributed to Jungbunzlauer.

19 For calculating the fines, the Commission used in the Decision the method described in the guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p, 3; 'the Guidelines') and the Leniency Notice.

20 First, the Commission determined the basic amount of the fine by reference to the gravity and duration of the infringement.

21 In that context, as regards the gravity of the infringement, the Commission found, first, that the parties concerned had committed a very serious infringement having regard to its nature, its actual impact on the EEA citric acid market and the scope of the relevant geographic market (recital 230 of the Decision).

22 Next, the Commission considered that it was necessary to take account of the actual economic capacity to cause significant damage to competition, and to set the fine at a level which ensured that it had sufficient deterrent effect. Consequently, taking as

its basis the worldwide turnover of the parties concerned from the sale of citric acid in the last year of the infringement, namely 1995, the Commission divided them into three categories as follows: in the first category, H&R with a worldwide market share of 22%, in the second, ADM and Jungbunzlauer with worldwide market shares of [*confidential*] [1] and HLR with a market share of 9%, and in the third category Cerestar with a worldwide market share of 2.5%. On that basis the starting amounts fixed by the Commission were EUR 35 million for the undertaking in the first category, EUR 21 million for those in the second and EUR 3.5 million for the one in the third category (recital 239 of the Decision).

23 In addition, the Commission adjusted the starting amount in order to ensure that the fine had a sufficient deterrent effect. Consequently, taking account of the size and overall resources of the parties concerned, as expressed by their total worldwide turnover, the Commission multiplied the starting amounts for the fines imposed on ADM and HLR by 2 and that for the fine imposed on H&R by 2.5 (recitals 50 and 246 of the Decision).

24 As regards the duration of the infringement committed by each undertaking, the resulting starting amount was increased by 10% per year, giving an increase of 40% for ADM, H&R, HLR and Jungbunzlauer, and 30% for Cerestar (recitals 249 and 250 of the Decision).

25 Thus, the Commission set the basic amount of the fines at EUR 29.4 million for Jungbunzlauer. For ADM, Cerestar, HLR and H&R, the basic amounts were set at EUR 58.8 million, EUR 4.55 million, EUR 58.8 million and EUR 122.5 million respectively (recital 254 of the Decision).

1 — Confidential data omitted.

26 Secondly, the basic amounts for ADM and HLR were increased by 35% to take account of aggravating factors on the ground that they had acted as leaders of the cartel (recital 273 of the Decision).

27 Thirdly, the Commission examined and rejected the arguments of certain undertakings with regard to attenuating circumstances (recitals 274 to 291 of the Decision).

28 Fourthly, pursuant to Article 15(2) of Regulation No 17, the Commission adjusted the resulting amounts for Cerestar and H&R so that they did not exceed the 10% limit of their worldwide turnover (recital 293 of the Decision).

29 Fifthly, under Section B of the Leniency Notice, the Commission allowed Cerestar a 'very substantial reduction' (90%) in the fine which would have been imposed if it had not cooperated. Pursuant to Section D of the Notice, the Commission allowed ADM a 'significant reduction' (50%), while Jungbunzlauer, H&R and HLR were granted reductions of 40%, 30% and 20% respectively (recital 326 of the Decision).

Procedure and forms of order sought by the parties

30 By application lodged at the Registry of the Court of First Instance on 25 February 2002, Jungbunzlauer brought the present action.

31 By order of 18 June 2002, the President of the Court of First Instance granted the Council leave to intervene in support of the forms of order sought by the Commission.

32 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure as laid down in Article 64 of the Rules of Procedure of the Court of First Instance, submitted written questions to the parties, to which they replied within the prescribed time-limits.

33 The parties presented oral argument and replied to the Court's questions at the hearing on 24 May 2004.

34 The applicant claims that the Court should:

— annul the Decision;

— in the alternative, reduce the fine;

— order the Commission to pay the costs.

35 The Commission and the Council, intervening, contend that the Court should:

— dismiss the application;

— order Jungbunzlauer to pay the costs.

Law

36 The applicant raises, first, an objection of illegality on the ground that Article 15(2) of Regulation No 17 infringes the principle of legality in that that provision does not predetermine sufficiently the Commission's decision-making practice ('the principle of legality'). Next, the applicant submits that the Decision is vitiated by errors concerning the addressee of the Decision, the assessment of the gravity of the infringement, the recognition of attenuating circumstances, the failure to take account of fines imposed in other countries, the observance of the limit on fines provided for by Article 15(2) of Regulation No 17, and the right of access to the file. Lastly, the applicant claims that the duration of the administrative procedure should have some bearing on the amount of the fine.

I — *Failure to observe the principle of legality*

A — *Objection of illegality in relation to Article 15(2) of Regulation No 17*

1. Arguments of the parties

37 Jungbunzlauer raises an objection of illegality within the meaning of Article 241 EC and submits that Article 15(2) of Regulation No 17, which empowers the Commission to impose fines in the event of infringement of Community competition law, infringes the principle of legality, a corollary to the principle of legal certainty, which is a general principle of Community law, in that that provision does not predetermine sufficiently the Commission's decision-making practice.

38 First, Jungbunzlauer claims that the principle of legality is enshrined in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), which provides as follows:

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

39 Jungbunzlauer relies on Article 6(2) EU, which provides that '[t]he Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

40 Jungbunzlauer adds that, according to the settled case-law of the Court of Justice and the Court of First Instance, any Community provision laying down penalties, whether of a criminal nature or not (Case 117/83 *Könecke* [1984] ECR 3291, paragraph 11, and Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15), must respect the principle of legality as a corollary to the principle of legal certainty (Case 29/69 *Stauder* [1969] ECR 419, paragraph 7; Case C-143/93 *Van Es Douane Agenten* [1996] ECR I-431, paragraph 27; Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECR I-6609, paragraph 25; and Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, paragraph 59 et seq.).

41 Lastly, Jungbunzlauer observes that the principle of legality is also enshrined in Articles 41 and 49 of the Charter of Fundamental Rights of the European Union,

proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1; 'the Charter of Fundamental Rights') and forms an integral part of the common constitutional traditions of the Member States.

42 Jungbunzlauer claims that, by virtue of the principle of legality, a corollary to the principle of legal certainty, Community legislation must be clear and foreseeable for those subject to it (Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECR 2735, paragraph 10; Case 70/83 *Kloppenburg* [1984] ECR 1075, paragraph 11; *Könecke*, paragraph 40 above, paragraph 11; and *Maizena*, paragraph 40 above, paragraph 15) and that certainty and foreseeability are requirements which must be observed all the more strictly in the case of rules liable to entail financial consequences (Case C-30/89 *Commission* v *France* [1990] ECR I-691, paragraph 23, and case-law cited). This is particularly the case with regard to a Council provision empowering the Commission to act, which can be valid only if it is sufficiently specific, in the sense that the Council must clearly specify the bounds of the power conferred on the Commission (Case 291/86 *Central-Import Münster* [1988] ECR 3679, paragraph 13).

43 Jungbunzlauer submits that the principle of legality is vitally important for provisions laying down fines (Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403, paragraph 46; *Kloppenburg*, paragraph 42 above, paragraph 11; *Maizena*, paragraph 40 above, paragraph 15; and Case C-352/92 *Milchwerke Köln* [1994] ECR I-3385, paragraphs 22 and 23). According to Jungbunzlauer, those provisions must designate in a foreseeable manner not only the conduct sanctioned, but also the consequences ensuing for the individual (*Criminal proceedings against X*, paragraph 40 above, paragraph 25).

44 Jungbunzlauer considers that Article 15(2) of Regulation No 17 provides for the possibility of imposing a criminal or quasi-criminal penalty.

45 In that connection, Jungbunzlauer refers first to statements by Mr Monti, at that time the Commissioner responsible for competition policy, the wording of the Guidelines and the terms used by the Commission in its defence. These refer to 'sanctions' and 'punishment' for offences under Articles 81 EC and 82 EC, which must be sufficiently high to have a 'deterrent effect'.

46 In addition, Jungbunzlauer observes that the Court has already recognised that the fines provided for in Article 15 of Regulation No 17 are not in the nature of periodic penalty payments, but that their object is to suppress illegal activities and to prevent any repetition (Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 172 and 173) which, according to Jungbunzlauer, is consistent with the broad interpretation of the concept of criminal charge given by the European Court of Human Rights. Jungbunzlauer adds that, in Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613, paragraphs 109 and 122, the Court of First Instance examined the validity of the fine imposed under Article 15(2) of Regulation No 17 in the light of Article 7 of the ECHR.

47 The applicant considers that this conclusion is not affected by the words used in Article 15(4) of Regulation No 17, which states that decisions imposing fines are not 'of a criminal law nature', because, according to the case-law of the European Court of Human Rights, the decisive factor is not the description of a legal act, but its actual content.

48 Therefore, according to Jungbunzlauer, the procedure leading to the imposition of a fine pursuant to Article 15(2) of Regulation No 17 must meet all the minimum requirements from the viewpoint of the fundamental rights arising not only from the ECHR, as interpreted by the European Court of Human Rights, but also from the Charter of Fundamental Rights, which confirms the rights arising from the said case-law.

49 In that context, Jungbunzlauer claims that it is clear from the case-law of the European Court of Human Rights that both the offence and the penalty incurred for an infringement must be 'provided for by law', which means that individuals must be able to foresee, to a degree which is reasonable according to the circumstances of the case, the consequences which may follow from a given act. The European Court of Human Rights has added that a law which confers a power of assessment does not in itself conflict with that requirement, provided that the extent and the rules for exercising such power are laid down sufficiently clearly, having regard to the legitimate aim pursued, to give the individual adequate protection against arbitrary decisions.

50 In view of the foregoing, Jungbunzlauer considers that the principle of legality is not observed where a provision for the imposition of a fine does not limit sufficiently the potential legal consequences of a decision in the case, but leaves the competent authority, because of the imprecise wording of the measure in question, broad options in applying the measure to the particular case. In that situation, the legal consequences are not determined in advance by the legislature, contrary to what is required by the principle of legality, but ordered by the administration. Jungbunzlauer states that although the administration may have a margin of discretion which is not in itself illegal under the principle of legality, the fact remains that that margin must not be unlimited.

51 Jungbunzlauer considers that Article 15(2) of Regulation No 17 does not meet the minimum requirements set out above.

52 Jungbunzlauer observes that Article 15(2) of Regulation No 17 empowers the Commission to impose fines for infringement of the Treaty competition rules, the fine being a minimum of EUR 1 000 and a maximum to be determined individually for each undertaking by reference to its turnover. It adds that, regarding the specific

amount of the fine, the second subparagraph of Article 15(2) of Regulation No 17 states merely that 'in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'.

53 Jungbunzlauer considers that, as a consequence of that provision, the Commission has an almost unlimited discretion in relation to setting the amount of fines.

54 First, Jungbunzlauer refers to the fact that, from now on, contrary to the situation prevailing when Regulation No 17 was adopted, as the turnover of worldwide groups may in some cases amount to several hundred billion euro, the maximum fine may easily reach several tens of billions of euro. It observes, by way of example, that if the petroleum group ExxonMobil, whose group turnover totals EUR 248 billion, were to take part in a cartel, the Commission could fine it between EUR 1 000 and EUR 24.8 billion, which is equivalent to the gross national product of Luxembourg. Jungbunzlauer submits that if, for a given offence, the law allows an authority a scale of fines from EUR 1 000 to EUR 24.8 billion — or even to grant total exemption under the Leniency Notice — the fine is not determined in advance by the law, but solely by the authority. In the final analysis, such a provision opens the door to the imposition of arbitrary fines.

55 Secondly, with regard to the Guidelines, the applicant submits that they do not constitute a 'law' within the meaning of the ECHR. The applicant points out that they are binding on the Commission alone, but not the Community Courts (Case T-81/97 *Regione Toscana* v *Commission* [1998] ECR II-2889, paragraph 49, and Opinion of Advocate General Alber in Case C-17/99 *France* v *Commission* [2001] ECR I-2481, at I-2484, point 23), which have unlimited jurisdiction to review Commission decisions. According to the applicant, since those courts have jurisdiction to set the final amount of fines and since they are not bound by the

Guidelines, those guidelines do not affect the question whether the legality of a criminal rule within the meaning of Article 7 of the ECHR is sufficient. Furthermore, the applicant observes that the Court of First Instance has recently stated that the legal framework applying to fines was defined by Regulation No 17 alone (*Brugg Rohrsysteme* v *Commission*, paragraph 46 above, paragraph 123).

56 Thirdly, Jungbunzlauer challenges the well-foundedness of the Commission's argument that a greater degree of foreseeability and reliability in the calculation of fines would be inconsistent with the principle that the fine must, first, take account of the particular circumstances of the case and, second, have a deterrent effect sufficient to ensure compliance by undertakings with the competition rules. On the contrary, according to Jungbunzlauer, it is the awareness or potential awareness of the possible consequences of a criminal act that make it possible to ensure more effectively the deterrent effect sought by the Commission. That is the main reason why the criminal laws of the Member States consist of a number of different acts defined as criminal offences, each with different consequences as to the penalty. On the basis of those provisions and their interpretation in national case-law, the individual is able to foresee with sufficient precision the penal consequences of his actions. The almost unlimited range of penalties laid down by Article 15(2) of Regulation No 17 precisely does not have that deterrent effect because it does not give the slightest indication of the actual nature of the misconduct which would in principle lead to the complete exhaustion of that limit.

57 Jungbunzlauer adds that the fact that the Guidelines do not provide sufficient detail for the calculation of fines is illustrated by the fact that the Commission 'may' choose any amount over EUR 20 million as the starting amount in the case of 'very serious' offences. The Guidelines do not give the slightest indication of the conditions which would lead the Commission to choose a basic amount of EUR 20, 50 or 100 million or an even higher amount.

58 Fourthly, Jungbunzlauer considers that the Council's argument that the fines set by the Commission are, if necessary, reviewed by the Community Courts, which have unlimited jurisdiction, cannot succeed either. According to Jungbunzlauer, the Council overlooks the fact that the requirement that legal provisions must be sufficiently clear aims precisely to enable the Community Courts to review the legality of decisions made on the basis of those provisions. The Council's argument amounts to delegating the task of the Community legislature to the Community Courts.

59 Fifthly, Jungbunzlauer submits that, at national level, there is no comparable measure that empowers an authority to impose almost unlimited fines. With regard to the comparison with Swedish law, to which the Council refers, Jungbunzlauer submits that Swedish law was modelled on Community law and therefore contributes nothing useful to the argument. So far as German law, also referred to by the Council, is concerned, Jungbunzlauer observes that the German provisions on setting fines for infringements of competition law form a complex system which is not comparable to the general power provided for in Article 15(2) of Regulation No 17. The German provisions lay down an upper limit of EUR 500 000 and, beyond that, up to three times the profit gained from the infringement, which in practice leads to a lower level of fines than that resulting from Article 15(2) of Regulation No 17. Jungbunzlauer adds that that level is further modified by the manner in which the offence was committed. The full fine is imposed only where the act is deliberate, whereas in the case of an act committed as a result of negligence, only one half of the specified maximum may be imposed. Within those limits, the fine is calculated according to strictly defined criteria relating to, for example, the scale of the offence, the seriousness of the charge, the particular circumstances of the offender and its financial situation. Jungbunzlauer admits that these rules likewise do not permit the amount of fines to be determined in advance with the precision of an accountant. However, such precision goes far beyond the degree of delimitation provided for by Article 15(2) of Regulation No 17. Jungbunzlauer submits that it was mainly the idea that an approach based on turnover alone did not take sufficient account of the scope and gravity of the infringement that led the German legislature in 1999 to decide against amending the law to that effect.

60 Sixthly, Jungbunzlauer asserts that its argument is supported by the Commission's decision-making practice on fines. The Commission's practice is characterised not only by considerable differences in fines in absolute figures but also, and more importantly, by a drastic increase in the amounts of fines since 2001. In particular, Jungbunzlauer observes that it is clear from the average fine imposed on undertakings between 1994 and 2000, compared with the record fine of EUR 462 million imposed in 2001 in Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1), that the ratio is almost 1 to 15. Even the second-highest fine imposed on an undertaking in 2001, namely the fine of EUR 184.27 million imposed in Commission Decision 2004/337/EC of 20 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.212 — Carbonless paper) (OJ 2004 L 115, p. 1), is still nearly six times greater than the average figure. Jungbunzlauer considers that the fact that all those decisions, like the earlier, entirely different, practice of the Commission, are based on the sole legal framework for fines, namely Article 15(2) of Regulation No 17, demonstrates that in reality it has no delimiting effect on the Commission's practice. This development constitutes in reality not an increase in the level of fines, but rather a multiplication thereof.

61 Seventhly, Jungbunzlauer observes that in an article published in 1993, a Commission official admitted that the procedure capable of leading to fines under Regulation No 17 '[seems] to be far from what is usually described as due process'.

62 In the alternative, Jungbunzlauer considers that, even assuming that Article 15(2) of Regulation No 17 is compatible with the principle of legality, the Commission should at least interpret it restrictively and compensate for its lack of definition with a consistent and transparent system of fines which offers the undertakings concerned the necessary degree of legal certainty. According to Jungbunzlauer, such an interpretation should result in the Commission being prepared to guarantee

a minimum degree of transparency and foreseeability with regard to the setting of fines. The broad authorisation conferred by Article 15(2) of Regulation No 17 should, in its submission, acquire a minimum degree of clarification and definition as a result of the Commission's decision-making practice, which would thus exclude surprise decisions, as in the present case.

63 The Commission and the Council contend that Article 15(2) of Regulation No 17 does not infringe the principle of legality.

64 The Commission states in particular that its decisions on fines are subject to unlimited review by the Community Courts. It also points out that the criteria laid down by Article 15(2) of Regulation No 17 have been elaborated on in the case-law and in the Guidelines. In its view, if the criteria were formulated in greater detail, it would be unable, first, to take the particular circumstances of each case into account and, secondly, to ensure that fines have a deterrent effect.

65 The Commission adds that, in accordance with Article 15(4) of Regulation No 17, the competition rules are not of a criminal law nature. It also considers that the applicant is wrong in claiming a breach of Article 7(1) of the ECHR and Articles 41 and 49 of the Charter of Fundamental Rights.

66 The Commission also observes that it is empowered to raise the level of fines and that the Guidelines do not affect the legal framework for setting fines.

67 Lastly, with regard to the comparison with German law, the Commission puts forward the example of a German criminal measure to illustrate the fact that German law also allows for very broad discretion within the limits of which the individual penalty must be determined.

68 The Council submits that the abovementioned provisions of the ECHR and the Charter of Fundamental Rights do not apply to Article 15(2) of Regulation No 17. Furthermore, in the Council's submission, Article 15(2) is perfectly clear and unambiguous.

2. Findings of the Court

69 Article 15(2) of Regulation No 17, as last amended by Regulation (EC) No 1216/1999 of 10 June 1999 (OJ 1999 L 148, p. 5), provides as follows:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from [EUR 1 000] to [EUR 1 000 000], or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article [81](1) [EC] or Article [82 EC]; or

(b) they commit a breach of any obligation imposed pursuant to Article 8(1).

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

70 It is necessary to ascertain whether, as the applicant claims, Article 15(2) of Regulation No 17 infringes the principle of legality by not predetermining sufficiently the Commission's decision-making practice.

71 On this subject, it must be observed that the Court of Justice has consistently held that the principle of legality is a corollary to the principle of legal certainty, which is a general principle of Community law which requires, in particular, that, where a Community rule imposes or permits the imposition of penalties, that rule must be clear and precise, so that the persons concerned may be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (see, to that effect, Case 169/80 *Gondrand* [1981] ECR 1931, paragraph 17; *Maizena*, paragraph 40 above, paragraph 15; *Van Es Douane Agenten*, paragraph 40 above, paragraph 27; and *Criminal proceedings against X*, paragraph 40 above, paragraph 25).

72 Likewise it is clear from settled case-law that this principle must be observed in relation to provisions of a criminal nature as well as specific administrative instruments imposing or permitting the imposition of administrative penalties (see *Maizena*, paragraph 40 above, paragraphs 14 and 15, and case-law cited) and that it applies not only to provisions establishing the elements which constitute an offence, but also to those specifying the consequences arising from an offence (see, to that effect, *Criminal proceedings against X*, paragraph 40 above, paragraphs 22 and 25).

73 In addition, it must be observed that the principle of legality forms part of the general principles of Community law underlying the constitutional traditions

common to the Member States and that it has been enshrined in various international treaties, in particular Article 7 of the ECHR in relation to criminal offences and penalties (see, to that effect, *Criminal proceedings against X*, paragraph 40 above, paragraph 25).

74 It is settled case-law that fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures (Opinion 2/94 [1996] ECR I-1759, paragraph 33, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14). For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and *Kremzow*, paragraph 14). Moreover, according to Article 6(2) EU, 'the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law' (Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraphs 23 and 24, and *Mannesmannröhren-Werke* v *Commission*, paragraph 40 above, paragraph 60).

75 In that connection, regard must be had to the wording of Article 7(1) of the ECHR:

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

76 According to the European Court of Human Rights, it follows from that provision that the law must clearly define crimes and the relevant penalties. This requirement is satisfied where the individual can know from the wording of the relevant provision

and, if need be, with the assistance of the courts' interpretation, what acts and omissions will make him criminally liable (see European Court of Human Rights, *Coëme v. Belgium*, 22 June 2000, 2000-VII, p. 1, § 145).

77 Referring to Article 15(4) of Regulation No 17, which provides that decisions made by the Commission pursuant to Article 15(2) are not of a criminal law nature, the Commission and the Council expressed doubts as to whether the Court of First Instance may draw inspiration from Article 7(1) of the ECHR and the case-law of the European Court of Human Rights relating to that provision in order to consider the legality of Article 15(2) of Regulation No 17.

78 On this subject, the Court points out, first, that it has no jurisdiction to assess the legality of Article 15(2) of Regulation No 17 in the light of Article 7(1) of the ECHR in so far as the provisions of the ECHR do not, as such, form part of Community law (see, to that effect, *Mannesmannröhren-Werke* v *Commission*, paragraph 40 above, paragraph 59). However, as stated at paragraph 74 above, fundamental rights form an integral part of the general principles of law the observance of which is ensured by the Community Courts by taking account of the ECHR in particular for guidance.

79 Next, without it being necessary for the Court to give a ruling on the question whether, by reason of the nature and the severity of the fines imposed by the Commission under Article 15(2) of Regulation No 17, Article 7(1) of the ECHR could apply to such administrative penalties and could therefore offer guidance to the Court (see, in that connection, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 215 to 223), suffice it to observe that Article 7(1) of the ECHR does not require the terms of the provisions by virtue of which those fines are imposed to be so precise that the potential consequences of an infringement of those provisions should be foreseeable with absolute certainty.

80 According to the settled case-law of the European Court of Human Rights, the existence of vague terms in a provision does not necessarily entail a violation of Article 7 of the ECHR. That court has observed that the concept of law used in Article 7 is the same as that found in other articles of the ECHR (see European Court of Human Rights, *Başkaya and Okçuoğlu v. Turkey* [GC], Nos. 23536/94 and 24408/94, 1999-IV, p. 308, § 36, and *Dansk Rørindustri and Others* v *Commission*, paragraph 79 above, paragraph 216). In addition, the European Court of Human Rights has observed that the wording of many statutes is not absolutely precise and that, because of the need to avoid excessive rigidity and to keep pace with changing circumstances, many laws are inevitably couched in terms which, to a greater or lesser degree, are vague and that the interpretation and application of such enactments depend on practice (see European Court of Human Rights, *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A, §§ 40 and 52). However, the European Court of Human Rights has also made it clear that every law presupposes qualitative conditions, including accessibility and foreseeability (*Başkaya and Okçuoğlu v. Turkey*, § 36). The fact that a law confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see European Court of Human Rights, *Margareta and Roger Andersson v. Sweden*, judgment of 25 February 1992, Series A No. 226-A, § 75). Finally, the European Court of Human Rights states that, in addition to the actual wording of the law, it takes account of the settled and published case-law when deciding whether the concepts used are definite or not (see European Court of Human Rights, *G. v. France*, judgment of 27 September 1995, Series A No. 325-B, § 25, and *E.K. v. Turkey*, No. 28496/95, 7 February 2002, § 51).

81 With regard to the constitutional traditions common to the Member States, there is nothing which would justify the Court of First Instance giving a different interpretation of the principle of legality, which is a general principle of Community law, from that resulting from the considerations set out above. First of all, where the applicant refers to the provision of German law under which the competent German authorities impose fines for infringement of the competition rules, it must be observed that a constitutional tradition common to the Member States cannot be inferred from the legal situation in a single Member State. In addition, as the applicant admitted at the hearing, the relevant law of many other Member States has

a degree of predetermination comparable to that of Article 15(2) of Regulation No 17, and even the same or similar criteria, for administrative penalties such as those imposed for the infringement of national competition rules.

82 Accordingly, the question whether Article 15(2) of Regulation No 17 conforms with the principle of legality must be examined in the light of the general principles set out above.

83 In that connection, it must be observed that the penalties laid down in Article 15(2) of Regulation No 17 in the event of infringement of Articles 81 EC and 82 EC are a key instrument available to the Commission for ensuring that 'a system ensuring that competition in the internal market is not distorted' (Article 3(1)(g) EC) is established within the Community. That system enables the Community to fulfil its task which consists, by means of the establishment of a common market, in promoting throughout the Community a harmonious, balanced and sustainable development of economic activities and a high degree of competitiveness (Article 2 EC). Furthermore, the said system is necessary for the adoption, within the Community, of an economic policy conducted in accordance with the principle of an open market economy with free competition (Article 4(1) and (2) EC). Accordingly, Article 15(2) of Regulation No 17 permits the establishment of a system which fits the fundamental tasks of the Community.

84 In addition, it must be added that, to avoid excessive prescriptive rigidity and to enable a rule of law to be adapted to the circumstances, a certain degree of unforeseeability as to the penalty which may be imposed for a given offence must be permitted. A fine subject to sufficiently circumscribed variation between the minimum and the maximum amounts which may be imposed for a given offence may therefore render the penalty more effective both from the viewpoint of its application and its deterrent effect.

85 In the present case, Article 15(2) of Regulation No 17 provides for fines from EUR 1 000 to 10% of the turnover in the preceding business year of the undertaking in question for the infringement of Articles 81(1) EC and 82 EC. Therefore it must be said that, contrary to the applicant's submission, the Commission does not have an unlimited power of assessment with regard to setting fines for infringement of the competition rules.

86 Moreover, the Court considers that, in providing for fines for infringing the competition rules from EUR 1 000 to 10% of the turnover of the undertaking concerned, the Council did not leave the Commission excessive latitude. In particular, the Court takes the view that the ceiling of 10% of the turnover of the undertaking concerned is reasonable, having regard to the interests defended by the Commission where such infringements occur. It must also be stressed that, contrary to the applicant's submission, the question whether fines on the basis of Article 15(2) of Regulation No 17 are reasonable should not be considered in absolute terms, but rather in relative terms, that is to say, by reference to the offender's turnover.

87 Furthermore, the Court points out that, in setting fines pursuant to Article 15(2) of Regulation No 17, the Commission is bound by the general principles of law, particularly the principles of equal treatment and proportionality, as recognised by the Court of Justice and the Court of First Instance. The well-established case-law of both Courts has also clarified the criteria and the method of calculation to be used by the Commission when setting fines (see, in particular, paragraph 213 et seq. below). Moreover, the applicant itself refers to that case-law in support of its submissions and arguments (see, in particular, paragraph 199 below).

88 In addition, on the basis of the criteria specified in Article 15(2) of Regulation No 17 and amplified in the case-law of the Court of Justice and the Court of First Instance, the Commission has itself developed a decision-making practice which is public

knowledge and is accessible. Although the Commission's previous decision-making practice is not binding as such on the Commission when it determines the amount of a fine (see, to that effect, Case T-23/99 *LR AF 1998* v Commission [2002] ECR II-1705, paragraph 234, and Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 254), nevertheless, by virtue of the principle of equal treatment, which is a general principle of law which must be observed by the Commission, the Commission cannot treat comparable situations differently or different situations in the same way, unless such treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309).

89 In addition, it must be borne in mind that, with a view to transparency and to increase legal certainty for the undertakings concerned, the Commission has published guidelines setting out the calculation method which it imposes on itself in each particular case.

90 On the basis of all that information, contrary to the applicant's submission, a well-informed business undertaking can, by obtaining legal advice if necessary, foresee to the requisite legal standard the method and the order of magnitude of the fines incurred for any given conduct. The fact, not disputed by the Commission and the Council, that undertakings are not in a position to know in advance the exact level of the fines that the Commission will choose in each individual case is not such as to establish that Article 15(2) of Regulation No 17 is contrary to the principle of legality.

91 Although it is true that undertakings are not in a position to know in advance the exact level of the fines that the Commission will choose in each individual case, nevertheless, in accordance with Article 253 EC, in a decision imposing a fine the Commission must state the reasons, particularly with regard to the amount of the fine and the method of calculation. The statement of reasons must show the

Commission's reasoning clearly and unequivocally so that those concerned can know the justification for the measure taken in order to decide whether it would be expedient to refer the matter to a Community Court and, as the case may be, so that the Court can exercise its power of review.

92 In the light of all the foregoing, the objection of illegality raised in relation to Article 15(2) of Regulation No 17 must be dismissed.

B — *The correct interpretation of Article 15(2) of Regulation No 17*

93 The applicant submits that, even assuming that Article 15(2) of Regulation No 17 is compatible with the principle of legality, a corollary to the principle of legal certainty, the Commission should at least interpret it restrictively and compensate for its lack of definition with a consistent and transparent system of fines which offers the undertakings concerned the necessary degree of legal certainty.

94 The Commission observes that it was precisely in order to provide a sufficient degree of transparency that it adopted the Guidelines and that, since that was done, its freedom to choose the amount of fines has been restricted.

95 The Court finds that, in the context of this second limb of the present plea, put forward as the alternative to the first, the applicant has raised no specific complaint in relation to the Decision, but formulates general submissions to the effect that the Commission should, in a general way, modify its policy on fines by reducing the amounts of fines or by clarifying the terms of the Guidelines.

96 This limb of the plea must accordingly be dismissed as inadmissible.

II — *The addressee of the decision*

97 The applicant raises pleas concerning, first, a failure to state reasons and, second, errors relating to the addressee of the Decision.

A — *Failure to state reasons*

98 Jungbunzlauer submits that the Decision contains no statement of the reasons as to why it should bear responsibility for Jungbunzlauer GmbH's anti-competitive conduct during the period prior to 1993.

99 The Commission has put forward no specific arguments on this point.

100 The Court notes that it is settled case-law that the statement of reasons required by Article 253 EC must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court to exercise its power of review. The requirement to state reasons must be assessed in the light of the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of

the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. In that regard, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and Case C-301/96 *Germany* v *Commission* [2003] ECR I-9919, paragraph 87).

101 In the present case, the Commission gave the following reasons in justification of its decision to attribute the infringement to Jungbunzlauer not only for the period subsequent to August 1993, but also for the period from the beginning of the infringement in March 1991 up to and including July 1993.

102 In recitals 30 and 33 of the Decision, the Commission observed that the applicant, Jungbunzlauer, was the management company which, since the restructuring of the group in 1993, had run the business of the Jungbunzlauer group, which was controlled by a holding company, Jungbunzlauer Holding AG. The Commission noted that, since 1993, the applicant had also run the group's business on the market for citric acid, which was produced within the group by Jungbunzlauer GmbH, a wholly-owned subsidiary of Jungbunzlauer Holding AG. The Commission added that, before the restructuring of the group in 1993, the group had been directed by Jungbunzlauer GmbH. Until 1993 the distribution of citric acid had been handled by Jungbunzlauer GmbH and, after that date, by another subsidiary of Jungbunzlauer Holding AG, namely Jungbunzlauer International AG.

103 In recital 70 of the Decision, the Commission noted that, at meetings of the cartel, the Jungbunzlauer group was represented by the chief executive officer (CEO) of the group and the managing director of Jungbunzlauer GmbH.

104 In recital 186 of the Decision, the Commission observed that, in its reply to the statement of objections, Jungbunzlauer and Jungbunzlauer GmbH stated jointly that Jungbunzlauer GmbH should be regarded as the addressee of the Decision. On this point the Commission gave the following reasons:

'(187) ... First, until the second half of 1993, Jungbunzlauer [GmbH] was not solely a subsidiary in charge of the production and distribution of citric acid, but also the legal entity responsible for the management of the whole Jungbunzlauer group. In 1993, that responsibility passed to Jungbunzlauer AG, which can be regarded as the successor to Jungbunzlauer [GmbH] with respect to the management of the Jungbunzlauer group. Since that date, Jungbunzlauer [GmbH] became a wholly-owned subsidiary within the group, which did not decide independently upon its own conduct on the market, but carried out, in all material respects, the instructions issued by Jungbunzlauer AG, the company responsible for management of the group.

(188) For a certain part of the period considered in the present Decision, Jungbunzlauer AG took part directly in cartel meetings, notably in the person of its CEO. It must therefore be concluded that at any period of time considered in the present Decision, the legal entity responsible for the management of the whole Jungbunzlauer group was actively and directly involved in the cartel. Since the legal entity in question is currently Jungbunzlauer AG, the latter must be an addressee of the present Decision.'

105 These statements, although succinct, identify the primary factors used by the Commission to justify the attribution of the infringement to Jungbunzlauer for the period prior to 1993. The Commission indicated that it considered that the applicant was responsible for the infringement in the period prior to the restructuring of the group in 1993 because of a succession of management tasks for the group business, particularly in the citric acid market.

106 Consequently, the plea alleging a failure to state reasons must be dismissed.

B — *The plea alleging errors concerning the addressee of the Decision*

1. Arguments of the parties

107 Jungbunzlauer submits that it is not the correct addressee of the Decision. In its application it claims that the Decision ought to have been addressed to Jungbunzlauer GmbH. It observes that the latter was the company within the group which produced and distributed citric acid and which also, until 1993, was responsible for the management of the whole group. With regard to the period after the applicant itself was formed in 1993 as a management company, it states in its reply that even after that date the 'actual management' of the group was in the hands of Jungbunzlauer Holding AG.

108 In relation to the period after 1993, Jungbunzlauer observes, first, that from that year both Jungbunzlauer itself and Jungbunzlauer GmbH were wholly-owned subsidiaries of Jungbunzlauer Holding AG, so that Jungbunzlauer itself was not the parent company of Jungbunzlauer GmbH, but only its sister company.

109 Therefore, according to Jungbunzlauer, the Commission cannot successfully rely on the judgments of the Court of Justice in Case 107/82 *AEG* v *Commission* [1983] ECR 3151 ('*AEG*'), paragraph 50, and Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925 ('*Stora*'), paragraph 28, which concerned the attribution of a subsidiary's conduct to the parent company. The relationship

between parent and subsidiary is qualitatively different from that which existed between Jungbunzlauer itself and Jungbunzlauer GmbH because Jungbunzlauer Holding AG, as the common parent company, could at any time withdraw from one of its subsidiaries the right to control one of its sister companies.

110 Jungbunzlauer adds that it only provided the other companies in the group with management and advisory services on questions of business, organisational and financial investment policy. Jungbunzlauer did this at the request of Jungbunzlauer Holding AG, which controlled the group and was the only one with the right to give instructions to the companies in the group. Jungbunzlauer had no such right of its own in relation to the different companies in the group and no such right was conferred upon it as the *Treuhänder* (trustee) of Jungbunzlauer Holding AG. On the contrary, its own business was confined to putting at the disposal of other group companies the services of the persons it employed. In so far as, in any particular case, those persons gave instructions to group companies (for example, Jungbunzlauer GmbH), they did so, not in Jungbunzlauer's name, but as representatives of Jungbunzlauer Holding AG.

111 Jungbunzlauer infers therefrom that the 'actual management' of the business of Jungbunzlauer Holding AG and of the entire group was solely the function of that company. This is corroborated by Austrian company law, which applies to Jungbunzlauer GmbH. A company which takes the form of a 'GmbH' or private limited company is managed by its bodies, namely the board of directors and the supervisory board, while its commercial policy is, in the final analysis, laid down by the general meeting of shareholders where, in the present case, Jungbunzlauer Holding AG, as the sole shareholder, held all the voting rights.

112 Secondly, the applicant submits that, even after it was formed in 1993, the principal participants in the discussions, with the exception of Jungbunzlauer's managing director, who took office in the summer of 1993, had for a long time carried out managerial functions within Jungbunzlauer GmbH. Moreover, after Jungbunzlauer

was formed in 1993, those persons continued to perform their duties in Jungbunzlauer GmbH. Most of their work related to Jungbunzlauer GmbH. The Commission's assertion that some of them had carried out tasks in the group is irrelevant in this context. According to Jungbunzlauer, the Commission ought at least to have indicated the different group companies which employed those persons, a list of whom was given in the reply to the statement of objections. By way of example, Jungbunzlauer submits that it is erroneous to assert that Messrs H. and R. were employed by it or by Jungbunzlauer Holding AG.

113 Thirdly, the applicant avers that, given the course of the administrative procedure, it is artificial to attribute the cartel to the applicant. It observes that the Commission addressed its requests for information of 6 August 1997, 28 July 1998 and 4 March 1999 to Jungbunzlauer GmbH and that the cooperation in the framework of the Leniency Notice was also provided by that company.

114 Moreover, in relation to the period prior to 1993, Jungbunzlauer observes, first, that until 1993 Jungbunzlauer GmbH had managed the group and before that date Jungbunzlauer was not even operational. Consequently, in its view, so far as the period prior to 1993 is concerned, no responsibility for anti-competitive conduct can be ascribed to it.

115 Secondly, Jungbunzlauer considers that the judgments relied on by the Commission do not support its argument that responsibility for the infringement by Jungbunzlauer GmbH may be transferred to it. It observes that Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 84 to 87, concerned a succession by law and that Case T-134/94 *NMH Stahlwerke* v *Commission* [1999] ECR II-239, paragraphs 35 to 38, related to the takeover of an insolvent company.

116 Thirdly, Jungbunzlauer argues that it could not be regarded as the 'economic successor' of Jungbunzlauer GmbH and that the latter's conduct before 1993 could not be attributed to it. This is shown by the fact that its own role in the group was limited to providing services for other group companies (see paragraph 110 above). Likewise it submits that, even after 1993, Jungbunzlauer GmbH continued its business of producing and marketing citric acid. Although in that connection Jungbunzlauer GmbH sometimes used the services of other group companies such as Jungbunzlauer, they only had the status of agents. Policy concerning quantities and prices was always imposed by Jungbunzlauer GmbH.

117 Fourthly, it is not correct that Messrs B. and H. managed Jungbunzlauer or acted on its behalf. In any case, so far as Mr H. is concerned, the applicant observes that he was not employed by it, but by other group companies.

118 Fifthly, the applicant notes that it had only limited financial resources.

119 The Commission points out that it relied on information provided by Jungbunzlauer GmbH and by Jungbunzlauer itself in the course of the administrative procedure.

120 With regard to the period after 1993, the Commission considers that it is clear from that information that, until 1993, Jungbunzlauer GmbH was responsible for the management of the group and that, in 1993, the applicant took over that function, so that there was an economic succession between those companies so far as the activities relating to the cartel are concerned. This finding is not affected by the fact that the applicant was only the sister company of Jungbunzlauer GmbH. The Commission observes that the Court of Justice has consistently held that the holding of share capital by a parent company enables it to influence decisively its subsidiary's

economic policy, unless that fact is disputed. Therefore it is not the holding of shares as such which is decisive, but the power thereby conferred on the parent company to exercise a decisive influence over the subsidiary's economic policy. However, according to the Commission, the parent may transfer to another group company the power to influence the conduct of one of its subsidiaries. That is said to be the case here.

121 With regard to the period prior to 1993, the Commission considers that, because of the abovementioned economic succession in respect of the tasks relating to the management of the Jungbunzlauer group's business on the citric acid market, the infringement by Jungbunzlauer GmbH before the 1993 restructuring must be attributed to Jungbunzlauer. The fact that the latter did not exist before 1993 and that Jungbunzlauer GmbH continued to exist after 1993 is irrelevant, as follows from the case-law of the Court of Justice and the Court of First Instance.

2. Findings of the Court

122 It is clear from the case-law that, in prohibiting undertakings, inter alia, from entering into agreements or participating in concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, Article 81(1) EC is aimed at economic units made up of a combination of personal and physical elements which can contribute to the commission of an infringement of the kind referred to in that provision (Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 235).

123 In the present case, the applicant does not deny the existence of an infringement of Article 81(1) EC. It does argue, however, that the Commission could not attribute responsibility for that infringement to it.

124 On that point, it must be observed, first, that until 1993 the Jungbunzlauer group was managed by Jungbunzlauer GmbH, which also produced citric acid but that, after the group restructuring in 1993, Jungbunzlauer, as a management company, managed all the business of the group, including that on the citric acid market, and that the group was headed by a holding company, namely Jungbunzlauer Holding AG (see paragraph 102 above).

125 With regard to the period subsequent to the restructuring of the Jungbunzlauer group in 1993, the Court notes that the applicant, a wholly-owned subsidiary of Jungbunzlauer Holding AG, was a sister company of Jungbunzlauer GmbH and not its parent company. In that context, the applicant rightly submits that the present case differed from those which gave rise to the case-law of the Court of Justice and the Court of First Instance (see, inter alia, Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [1998] ECR II-2111, paragraph 80, upheld on appeal in *Stora*, paragraph 109 above, paragraphs 27 to 29; *AEG*, paragraph 109 above, paragraph 50; and Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 149) which states, in essence, that the Commission is correct in presuming that a wholly-owned subsidiary carries out, in all material respects, the instructions of its parent company, without having to ascertain whether the parent actually exercised that power.

126 However, it is clear from the recitals of the Decision, and contrary to the applicant's submissions, that the Commission did not rely on such a presumption but instead examined, on the basis of the replies given by Jungbunzlauer and Jungbunzlauer GmbH during the administrative procedure, the question whether, notwithstanding the structure of the Jungbunzlauer group as described above, the infringement should be attributed to Jungbunzlauer.

127 In that regard, the Court notes that, following a request for information sent by the Commission to Jungbunzlauer GmbH on 3 March 1999, the latter wrote a letter on

21 May 1999, as part of its cooperation with the Commission, describing the structure of the Jungbunzlauer group and stating, in particular, that the 'management of the group [was] handled by Jungbunzlauer AG ... which, as a managing company, managed the companies owned by Jungbunzlauer Holding AG'.

128 In addition, on 28 March 2000 the Commission sent Jungbunzlauer the statement of objections. In its reply of 22 June 2000 to that statement of objections, Jungbunzlauer stated 'on behalf of Jungbunzlauer GmbH' that it could not be the addressee of any document relating to that procedure. In that connection it described the organisational structure of the Jungbunzlauer group and enclosed a diagram. The applicant indicated that Jungbunzlauer was only the management company which managed the companies owned by the group, which was headed by Jungbunzlauer Holding AG. Jungbunzlauer added that it was Jungbunzlauer GmbH which was 'operational' on the citric acid market, save with regard to the distribution of that product which, as from 1993, was handled on behalf of Jungbunzlauer GmbH by another subsidiary of Jungbunzlauer Holding AG, namely Jungbunzlauer International AG. Jungbunzlauer went on to state that 'until the second half of 1993, all management was handled by Jungbunzlauer [GmbH]' and that 'since 1993 Jungbunzlauer AG ... has existed as a management company'.

129 On the basis of the joint statements of Jungbunzlauer and Jungbunzlauer GmbH, referred to in recital 187 of the Decision, the Commission was justified in finding that, after the restructuring of the Jungbunzlauer group in 1993, the activities of Jungbunzlauer GmbH were limited to the mere production of citric acid, whilst the management of the group business, including that involving citric acid, was in the hands of Jungbunzlauer, so that Jungbunzlauer GmbH did not decide independently its own conduct on that market, but carried out, in all material respects, the instructions given by Jungbunzlauer. The Commission was justified in finding that the parent company common to Jungbunzlauer GmbH and Jungbunzlauer had decided to entrust the latter with the task of conducting the entire business of the group including, consequently, that associated with the group's conduct on the market covered by the cartel, namely the citric acid market.

130 The Commission therefore did not err in finding that, with regard to the period subsequent to the restructuring of the Jungbunzlauer group in 1993, the infringement had to be attributed to the applicant.

131 So far as the period prior thereto is concerned, the Court must find, as the Commission did in recital 187 of the Decision, that until 1993 Jungbunzlauer GmbH was responsible not only for the group's operations on the citric acid market, but also for managing the entire business of the group. The latter function, which consisted in conducting the group's business, including in the citric acid market, was however transferred in 1993 to Jungbunzlauer, which therefore became the economic successor of Jungbunzlauer GmbH with respect to the management of the group business.

132 The fact that a company continues to exist as a legal entity does not exclude the possibility that, with reference to Community competition law, there may be a transfer of part of the activities of that company to another which becomes responsible for the acts of the former (see, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 356 to 359).

133 Therefore the Commission was also correct in finding that, with respect to the period prior to the restructuring of the Jungbunzlauer group in 1993, the infringement was to be attributed to Jungbunzlauer.

134 Consequently, the plea alleging errors with regard to the addressee of the Decision must be dismissed.

III — *The gravity of the infringement*

135 The applicant considers, first, that the Commission did not make a correct assessment of the cartel's actual impact on the citric acid market and did not give an adequate statement of reasons on that point. Secondly, the applicant considers that the Commission failed to take sufficient account of the applicant's relatively limited financial strength in comparison with the other undertakings concerned.

A — *Whether the cartel had an actual impact on the market*

1. Introduction

136 First of all, it should be borne in mind that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case and its context; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33; and Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 443). In that context, the actual impact of the cartel on the relevant market may be taken into account as one of the relevant criteria.

137 In its Guidelines (first paragraph of Section 1A), the Commission stated that, in assessing the gravity of the infringement, it takes account of '[the] actual impact [of the infringement] on the market, where this can be measured', as well as its nature and the size of the relevant geographic market.

138 As far as the present case is concerned, it is clear from recitals 210 to 230 of the Decision that the Commission did in fact set the fine, determined by reference to the gravity of the infringement, taking into account those three criteria. In particular, it considered that the cartel had an 'actual impact' on the citric acid market (recital 230 of the Decision).

139 However, according to the applicant, in that context the Commission incorrectly assessed the actual impact of the cartel on the citric acid market and failed to give an adequate statement of reasons on that subject.

2. Whether there have been errors of assessment

140 According to Jungbunzlauer, the Commission made several errors of assessment which affected the calculation of the fine.

(a) The allegation that the Commission adopted an erroneous approach to show that the cartel had an actual impact on the market

Arguments of the parties

141 Jungbunzlauer complains that the Commission failed to prove the actual impact of the cartel on the market and reversed the burden of proof onto the undertakings concerned. It is for the Commission to adduce such proof when it chooses to take it into account in setting fines (Case T-308/94 *Cascades* v *Commission* [1998] ECR

II-925, paragraph 180 et seq., and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 4863).

142 In that context, the requirements concerning proof cannot be less stringent than for other relevant findings: the doubt must be construed in favour of the undertakings concerned (*in dubio pro reo*). Consequently, Jungbunzlauer considers that, if the circumstances found by the Commission may have a convincing explanation other than that accepted by the Commission, the requirements concerning the taking of evidence have not been fulfilled by the latter (*Suiker Unie and Others* v *Commission*, paragraph 115 above; Case 27/76 *United Brands* v *Commission*, [1978] ECR 207, paragraph 267; and Joined Cases 29/83 and 30/83 *CRAM* v *Commission* [1984] ECR 1679, paragraph 20).

143 Jungbunzlauer claims that it is clear from recitals 211, 213, 216, 218 and 226 of the Decision that, instead of proving that the cartel had effects on the market, the Commission inferred from the existence of the cartel that it had actually affected the market. Such reasoning amounts to a vicious circle, however, because, if it were true, every cartel would necessarily have effects on the market and examination by the Commission would be unnecessary. It is clear from the Commission's own decision-making practice that there are cartels which have no effect on the market, which is confirmed by the Guidelines (point 3) and the case-law of the Court of First Instance (*Cimenteries CBR and Others* v *Commission*, paragraph 141 above, paragraph 4863 et seq.).

144 The Commission does not deny that the criteria for the implementation and the actual impact of a cartel on the market must not be confused and that it is required to adduce evidence on that point. In its view, however, in the present case it did not reverse the burden of proof, but proved the point to the requisite legal standard.

Findings of the Court

145 In view of the complaints put forward by Jungbunzlauer regarding the approach adopted by the Commission to demonstrate that the cartel had an actual impact on the citric acid market, it is necessary to summarise the Commission's analysis, as set out in recitals 210 to 228 of the Decision, before adjudicating on the merits of Jungbunzlauer's arguments.

— Summary of the Commission's analysis

146 First of all, the Commission observed that 'the infringement was committed by undertakings, which during the material period covered on average over 60% of the world market and around 70% of the European market for citric acid' (recital 210 of the Decision).

147 The Commission went on to state that 'given that these arrangements were implemented, they had an actual impact on the market' (recital 210 of the Decision). In recital 212 of the Decision, referring to the part of the Decision relating to the description of the facts, the Commission repeated the argument that the cartel agreements had been 'carefully implemented' and added that 'one of the participants declared that it was "surprised at the level of formality and organisation to which the participants had gone to arrive at this arrangement"'. Likewise, in recital 216 of the Decision, the Commission noted that 'in the light of the foregoing and of the efforts devoted by each participant to the complex organisation of the cartel, the effectiveness of the implementation cannot be questioned'.

148 In addition, the Commission observed that there was no need 'to quantify in detail the extent to which prices differed from those which might have been applied in the

absence of these arrangements' (recital 211 of the Decision). Indeed, the Commission asserted that 'this cannot always be measured in a reliable manner, since a number of external factors may simultaneously have affected the price development of the product, thereby making it extremely difficult to draw conclusions on the relative importance of all possible causal factors' (ibid.). Nevertheless, in recital 213 of the Decision, the Commission described the movements in the prices of citric acid from March 1991 to 1995, noting essentially that, between March 1991 and the middle of 1993, citric acid prices rose by 40% and had been essentially maintained at that level after that date. Likewise, in recitals 214 and 215 of the Decision, the Commission observed that the cartel members had established sales quotas and devised and applied reporting, monitoring and compensation systems to ensure implementation of quotas.

149 Lastly, in recitals 217 to 228 of the Decision, the Commission summarised, examined and dismissed the parties' arguments in the course of the administrative procedure, including those put forward by Jungbunzlauer. In recital 226 of the Decision however, the Commission concluded, in the following terms, that the parties' arguments could not succeed:

'The explanations for the price increases of 1991-92 provided by ADM, [H&R] and Jungbunzlauer may have some validity, but they do not demonstrate in any convincing manner that the implementation of the cartel agreement could not have played any role in the price fluctuations. Whilst the phenomena described may occur in the absence of a cartel, they are also perfectly consistent with a cartel situation. The fact that the prices for citric acid increased by 40% in 14 months cannot be explained solely in terms of a competitive reaction, but must be interpreted in the light of the facts that the participants had agreed on coordinated price increases and market share allocation, as well as on a reporting and monitoring system. All this would have contributed to the success of the price increases.'

150 Likewise, in recital 228 of the Decision, the Commission replied as follows to the applicant's arguments:

'The fact, highlighted by Jungbunzlauer, that the cartel's overall "market share" diminished over time, from around 70% initially to 52% in 1994, certainly illustrates the difficulties encountered by the cartel participants in keeping the prices above a competitive level. This nevertheless does not demonstrate that the illegal practice had no effect on the market. On the contrary, the strong increase in imports from China from 1992 onwards indicates that the cartel members were not adapting as they normally would have done to the price pressure exerted by such imports.'

— Findings

151 It must be observed as a preliminary point that, pursuant to the first paragraph of Section 1A of the Guidelines, when calculating a fine by reference to the gravity of the infringement, the Commission is to take account of 'its actual impact on the market, where this can be measured'.

152 In that connection, it is necessary to determine the exact meaning of the words 'where this [that is, the actual impact] can be measured'. In particular, it is necessary to determine whether, within the meaning of those words, the Commission may take account only of the actual impact of an infringement in calculating fines if, and in so far as, it is able to quantify that impact.

153 As the Commission correctly observed, examination of the impact of a cartel on the market necessarily entails making assumptions. In that context, the Commission

must, in particular, consider what the price of the product would have been without the cartel. When examining the causes of actual price movements, it is hazardous to speculate as to the respective contribution of each cause. Account must be taken of the objective fact that, because of the price cartel, the parties have precisely surrendered their freedom to compete by means of prices. Therefore an assessment of the influence of factors other than the voluntary surrender of that freedom by the parties to the cartel is necessarily based on reasonable probabilities which cannot be quantified exactly.

154 Consequently, if the criterion in the first paragraph of Section 1A of the Guidelines is not to be rendered practically ineffective, the Commission cannot be criticised for relying on the actual impact on the market of a cartel with an anti-competitive purpose, such as a cartel fixing prices or quotas, without quantifying that impact or without providing an assessment with supporting figures.

155 The actual impact of a cartel on the market must therefore be regarded as sufficiently demonstrated if the Commission is able to provide specific and credible indicia showing, with reasonable probability, that the cartel had an impact on the market.

156 In the present case, the summary of the Commission's analysis (see paragraphs 146 to 150 above) shows that it relied on two indicia to find that the cartel had an 'actual impact' on the market. First, it referred to the fact that the cartel members carefully implemented the cartel agreements (see, in particular, recitals 210, 212, 214 and 215 of the Decision, referred to in paragraphs 147 and 148 above) and that, during the material period, those members covered over 60% of the world market and 70% of the European market for citric acid (recital 210 of the Decision, referred to in paragraph 146 above). Secondly, it found that the information given by the parties concerned during the administrative procedure showed a certain consistency between the prices set by the cartel and those actually charged on the market by the cartel members (recital 213 of the Decision, cited at paragraph 148 above).

157 Although it is true that the terms used in recitals 210 and 216 of the Decision (see paragraph 147 above) could, on their own, be construed as suggesting that the Commission relied on a cause-and-effect relationship between the implementation of the cartel and its actual impact on the market, nevertheless a reading of the Commission's entire analysis shows that, contrary to Jungbunzlauer's assertion, the Commission did not merely infer actual effects of the cartel on the market from its implementation.

158 In addition to the 'careful' implementation of the cartel agreements, it relied on movements in citric acid prices during the period covered by the cartel. In recital 213 of the Decision, the Commission described citric acid prices between 1991 and 1995 as agreed to by the cartel members, announced to customers and extensively implemented by the parties concerned. Whether there were manifest errors on the Commission's part in assessing the facts on which it based its findings, as Jungbunzlauer claims, is a question which will be considered below.

159 In that context, the Commission cannot be criticised for finding that the fact that the cartel members accounted for a very considerable share of the citric acid market (60% worldwide and 70% of the European market) was an important factor which ought to be taken into account in examining the cartel's actual impact on the market. It cannot be denied that the probable effectiveness of a cartel which fixes prices and sets quotas increases with the size of the market shares divided among the cartel members. Although that alone does not prove an actual impact on the market in question, nevertheless in the Decision the Commission did not show a cause-and-effect relationship of that kind, but merely took it into account as one factor among others.

160 As for the different judgments of the Court of Justice and the Court of First Instance relied on by Jungbunzlauer, it must be observed, first, that the judgments of the Court of Justice referred to in paragraph 142 above relate to the Commission's

burden of proof for finding that there is a concerted practice within the meaning of Article 81 EC and not, as in the present case, the effect of an infringement on the market, it being understood that the infringement undeniably had an anti-competitive purpose.

161 Secondly, in so far as the applicant relies on the reasoning at paragraph 4863 of the judgment in *Cimenteries CBR and Others* v *Commission*, paragraph 141 above, it must be observed that the Court in that case held essentially that where, in assessing the gravity of an infringement for the calculation of fines, the Commission takes as its basis the effects of the infringement on the market concerned, it must 'succeed in proving them or providing good reasons for taking them into account'. Therefore, contrary to Jungbunzlauer's reading of the said judgment, the Court clearly indicated that the burden of proving the existence of effects of the infringement on the market in question, which is borne by the Commission when it takes them into account for calculating the fine by reference to the gravity of the offence, is lighter than the burden of proof that it has when it must show the existence as such of an infringement in the case of a cartel. For the purpose of taking account of the actual effects of the cartel on the market, it is sufficient, according to that judgment, for the Commission to provide 'good reasons for taking them into account'.

162 Thirdly, regarding the judgment in *Cascades* v *Commission*, paragraph 141 above, it is true that, in that case, the Court considered whether the Commission had proved the existence of effects of the infringement on the relevant market. However, it is clear from paragraphs 181 to 185 of that judgment that the Commission had relied on a report to demonstrate the existence of effects but, according to the Court's findings, the report only partly supported the conclusions drawn by the Commission.

163 It follows from the foregoing that the Commission did not adopt a manifestly erroneous approach in assessing the actual impact of the cartel on the citric acid market.

(b) The assessment of movements in citric acid prices

Arguments of the parties

164 First, Jungbunzlauer denies that the Commission furnished proof of the actual impact of the cartel on the market with its assessment of movements in the price of citric acid between 1991 and 1993 as set out in recitals 213 and 214 of the Decision.

165 Although Jungbunzlauer does not deny that, in general, price agreements have repercussions when actual prices follow the agreed prices, nevertheless such an alignment was not proved by the Commission in the present case. Jungbunzlauer observes that, unlike the situation in *Cascades* v *Commission*, paragraph 141 above, paragraph 180 et seq., in the present case the applicant has always denied that customers were required to pay the prices agreed in the course of cartel meetings. It states that it explained this in detail for the entire period from 1991 to 1995 in the reply to the statement of objections and in the application.

166 Secondly, Jungbunzlauer submits that the Commission did not take proper account of the different circumstances which it had put forward during the administrative procedure to deny any impact of the cartel on the market.

167 In the first place, Jungbunzlauer complains that the Commission took into account the increases in citric acid prices found in the course of 1991 and 1992 (recital 213 of

the Decision) and rejected its argument that they did not originate in the cartel (recitals 224 to 226 of the Decision). According to Jungbunzlauer, if the Commission had examined, as it ought to have done, the economic conditions in the period in question, it would have found that it was not possible to demonstrate with sufficient certainty that the cartel was the source of the price increases.

168 Jungbunzlauer points out that, in Section III 1(a) of its reply to the statement of objections, it had stated that the main reason for the price increase in 1991 and 1992 was the considerable increase in demand as a result of the development of the market for citric acid or sodium citrate (for which citric acid is a base product) which is used as an agent in the detergent industry. The applicant notes that at the end of the 1980s and beginning of the 1990s, the detergent industry began, for reasons relating to protection of the environment and market policy, to replace phosphates with products having a citric acid base, which is ecologically advantageous, which led to a doubling in the rates of growth of citric acid and citrates. It adds that an even greater increase in demand was anticipated for the following years. It infers therefrom that the actual increase in demand and the anticipated increase in consumption in the 1990s enabled citric acid producers to demand higher prices.

169 Jungbunzlauer states that, in support of those submissions, it lodged internal studies and an article in the specialist press which showed, first, that the use of sodium citrates in the detergent industry in Europe was 22 times greater in 1990 than in 1989, secondly, that total sales of 44 000 tonnes could realistically be forecast for 1993 (which represented a 100% increase between 1990 and 1993) and, thirdly, that in addition a further significant increase of 22 000 tonnes per year was forecast for washing-up detergents for 1993.

170 It adds that in 1991 and 1992 the rising demand for citric acid could not be met with existing production capacities. The Jungbunzlauer group and other producers made additional purchases in Indonesia and China to cover their needs. This shows that there was considerable excess demand which led to the price increase in 1991 and 1992.

171 Jungbunzlauer goes on to observe that, in Section III 1(b) of its reply to the statement of objections, it had already stated that the price increase found by the Commission in 1991 and 1992 had to be kept in perspective in view of the fact that in the period 1986 to 1990 market prices had fallen by approximately 45%. It infers therefrom that the price increase in 1991 and 1992 was, in the final analysis, a price correction caused by market forces.

172 Secondly, Jungbunzlauer considers that the Commission was wrong to dismiss, in recital 227 of the Decision, the applicant's arguments based on the replies given by citric acid buyers to the requests for information addressed to them by the Commission on 20 January 1998. In its view, the replies, extracts of which are reproduced in the application and in the reply, confirm that the cartel did not have negative effects for buyers. Nor has the Commission produced replies from buyers which prove the contrary.

173 Jungbunzlauer considers that the Commission was wrong, in recital 227 of the Decision, to attempt to play down the importance of those replies by stating that the question asked 'concerning the intensity of competition in the market ... was ... framed in general terms' and that it had 'to be seen in the context of a preliminary investigation into the main features of the citric acid market'. However, the question was worded as follows: 'Does intense price competition exist on the citric acid market? Please give a detailed reply to this question.' According to Jungbunzlauer, the replies provided by customers gave a perfectly clear picture in that connection,

which the Commission simply ignored. The Commission cannot formulate a request for information and send it, at great expense, to numerous undertakings and then declare it inappropriate, apparently because it did not produce the desired result. In addition, contrary to the Commission's assertion, the context of the questions clearly shows that they all relate to the period subsequent to 1990.

174 Likewise, according to Jungbunzlauer, the Commission was wrong, in recital 227 of the Decision, to raise against the replies the fact that 'in view of the high degree of sophistication characterising the illegal arrangements, one could certainly not expect the customers to be in a position to confirm the [non-]existence of competition in the market in question'. On the contrary, Jungbunzlauer takes the view that it is inconceivable that the buyers mentioned did not notice unusual changes in the structure of prices. That is all the more so since the request for information was addressed to customers in the context of an investigation opened in cartel proceedings and the procedure in the United States relating to citric acid had already closed. The link between price increases and anti-competitive agreements therefore should have been obvious — almost all the customers mentioned were large-scale undertakings perfectly capable of establishing such a connection. The fact that none of the companies questioned drew that conclusion shows that the agreements had no repercussions on the market.

175 Thirdly, the applicant observes that it is clear from recital 225 of the Decision that it had already argued during the administrative procedure that, in its opinion, 'the fact that the overall worldwide market share fell from 70% originally to 52% in 1994 would demonstrate that the cartel was no longer in a position to influence price formation'. In its view, the Commission failed to consider this fact. It follows, in its view, that the cartel members certainly no longer had the market power necessary to impose the desired prices, that the cartel was steadily declining in importance and that, since 1993, it had certainly no longer been in a position to influence price formation at world level. This was clearly confirmed by Procter & Gamble's reply to the Commission's request for information of 20 January 1998.

176 The Commission denies Jungbunzlauer's argument and contends that it proved, to the requisite legal standard, that the cartel had an actual impact on the market.

Findings of the Court

177 It is settled case-law that, in reviewing the Commission's appraisal of the actual impact of a cartel on the market, it is particularly important that the Court examine the Commission's assessment of the cartel's effect on prices (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597 and, to that effect, *Cascades* v *Commission*, paragraph 141 above, paragraph 173, and Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 225).

178 It is also settled case-law that, in determining the gravity of the infringement, regard must be had to the legislative background and economic context of the conduct to which exception is taken (*Suiker Unie and Others* v *Commission*, paragraph 115 above, paragraph 612, and *Ferriere Nord* v *Commission*, paragraph 136 above, paragraph 38) and that, to assess the actual impact of an infringement on the market, the Commission must refer to the competition which would normally have existed without the infringement (see, to that effect, *Suiker Unie and Others* v *Commission*, paragraph 115 above, paragraphs 619 and 620; *Mayr-Melnhof* v *Commission*, paragraph 177 above, paragraph 235; and Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 645).

179 It follows that, in the case of price cartels, it must be found — with a reasonable degree of probability (see paragraph 155 above) — that the agreements actually enabled the parties concerned to reach a price level higher than that which would have prevailed without the cartel. It also follows that, in making its assessment, the Commission must take into account all the objective conditions of the market

concerned, having regard to the economic context and, if necessary, the legislative background. It is clear from the judgments of the Court of First Instance relating to the cartonboard cartel (see, inter alia, *Mayr-Melnhof* v *Commission*, paragraph 177 above, paragraphs 234 and 235) that account must be taken, where appropriate, of 'objective economic factors' showing that, given the 'free play of competition', the level of prices would not have moved in the same way as that of the prices applied (see also *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 177 above, paragraphs 151 and 152, and *Cascades* v *Commission*, paragraph 141 above, paragraphs 183 and 184).

180 In the present case, in recital 213 of the Decision, the Commission described as follows the movements in citric acid prices, as agreed and applied by the cartel members:

'From March 1991 to mid-1993, the prices agreed within the cartel were announced to customers and extensively implemented, in particular during the early years of the cartel. The price increase to DEM 2.25/kg ... by April 1991, decided at the cartel meeting of March 1991, was easily introduced. It was followed by a decision, taken by telephone in July, to increase the price to DEM 2.70/kg ... by August. This price increase was also successfully implemented. A final increase to DEM 2.80/kg ... was agreed at the meeting in May 1992 and was implemented in June 1992. After that date, no further price increase was implemented, and the cartel concentrated on the need to maintain these prices.'

181 Jungbunzlauer does not dispute the Commission's factual findings regarding movements in the agreed prices and the fixing of sales quotas, but essentially confines itself to observing that, in reality, customers were not required to pay those prices.

182 It is noteworthy that, in the letter of 29 April 1999, giving the Commission the information requested on the basis of Article 11 of Regulation No 17, the applicant described the prices fixed on the basis of the cartel. In addition, annexed to its reply to the statement of objections, it submitted to the Commission some graphs relating to the movement of the price of citric acid in the period 1991 to 1995.

183 The graphs in particular show that Jungbunzlauer, on its own initiative, established and submitted to the Commission that the prices which customers were actually required to pay followed parallel with the movement in prices as fixed by the cartel members, although they were generally below the level of the agreed prices. In particular, it is clear from the graphs that when, in March and July 1991, the cartel members decided to increase the price of the citric acid used in the foodstuffs industry from DEM 2.25 per kilogram to approximately DEM 2.7 per kilogram, the prices actually charged to customers, which in April 1991 were between DEM 1.9 and 2.1 per kilogram, rose to between DEM 2.7 and 2.75 per kilogram. Likewise, the graphs show that when, after that price rise, the cartel members agreed to maintain prices at between DEM 2.7 and 2.8 per kilogram, the prices actually demanded from customers were between DEM 2.6 and 2.75 per kilogram. Likewise, it appears from the graphs that the prices that customers were actually required to pay broadly followed the 1994 decisions by the cartel members to reduce citric acid prices to DEM 2.65 per kilogram, although at a lower level of between DEM 2.45 and 2.6 per kilogram.

184 It follows that, contrary to Jungbunzlauer's submissions, the information it gave the Commission in the course of the administrative procedure clearly shows that the prices fixed by the cartel members and those actually charged moved permanently in parallel.

185 In such a situation, the Commission was right, in recital 219 of the Decision, to refer to the judgment in *Cascades* v *Commission*, paragraph 141 above, paragraph 179, and to find that there was a direct connection between the movement in the prices

announced and that in the prices actually charged, in order to conclude that, on the basis of those factors, it had been shown to the requisite legal standard that the cartel had had an actual impact on the market which was 'measurable', within the meaning of the Guidelines, by comparing the hypothetical price which would have prevailed without the cartel with the price charged in the present case as a result of the formation of the cartel.

186 This finding is not affected by Jungbunzlauer's objection that prices would have risen even without the cartel. Although such a possibility cannot be ruled out, the Commission nevertheless was justified in finding, in recital 226 of the Decision, that the increase in prices cannot be explained solely in terms of a purely competitive reaction of the market, but must be interpreted in the light of the fact that the cartel enabled its members to coordinate price increases. Therefore it cannot be argued that price levels without the cartel would have moved in the same way as the prices charged as a result of the cartel. This is confirmed by Jungbunzlauer's own statement in its letter of 21 May 1999. Although the possibility cannot be ruled out that reasons other than the endeavour to make the cartel effective may have induced its members to set up coordination, reporting and monitoring systems, nevertheless, taking account of the administration costs and the risks of detection arising from such collusion, the Commission's explanation, that is to say, optimisation of the cartel's effectiveness, is the most plausible explanation (see paragraph 154 above).

187 Likewise, contrary to Jungbunzlauer's argument, the Commission was justified in rejecting as inconclusive, in recital 227 of the Decision, the replies from citric acid buyers to its request for information of 20 January 1998.

188 The Commission's fourth question in the request for information was whether buyers had witnessed significant increases in the price of citric acid between 1990 and the date of dispatch of the request in 1998. Although some buyers stated in their

reply that they had witnessed price rises in the course of specific periods which corresponded to the price increases agreed upon by the cartel, others referred only to periods after the end of the cartel in 1995 or stated that they had witnessed price reductions. In addition, the other questions, as put by the Commission in its letter of 20 January 1998, related not to the period covered by the cartel, but to the market situation at the date of dispatch of the letter. That is why the buyers' replies were not conclusive as to the actual effect of the cartel on the market.

189 Lastly, the fact, relied on by Jungbunzlauer, that in 1994 the total world market share held by the parties concerned fell from 70% at the initial stage of the cartel to 52% does not disprove that the cartel had an actual impact on the relevant market. First, as the Commission rightly observes, the main reason for the finding of an actual impact was the increase in the prices of citric acid between 1991 and 1993. Secondly, with regard to the period from 1993 to 1995, the effect found by the Commission was essentially a stabilisation of the price at a higher level than that prevailing before the increase, in 1991. The fact that the cartel members held only 52% of the market does not indicate that they were not able at least to encourage the trend towards price stabilisation.

190 In the light of the foregoing, the Commission did not make any manifest errors of assessment as to movements in citric acid prices.

3. Failure to state reasons

191 Jungbunzlauer claims that the Decision is vitiated by a failure to state reasons. In its view, the Commission did not show how the agreements had affected the market,

but merely rejected the evidence to the contrary provided by Jungbunzlauer during the administrative procedure, declaring it to be insufficient, without giving the slightest justification. In particular, Jungbunzlauer complains that the Commission did not state its position on the replies from the different undertakings to its requests for information, although the applicant raised this point expressly in its reply to the statement of objections.

192 The Commission considers that it gave sufficient reasons on this point in the Decision.

193 The Court observes that, in recitals 92 to 111 of the Decision, the Commission described precisely the agreements as implemented by the cartel members, including the price agreements (recitals 95 and 96 of the Decision). Furthermore, in the part concerning the legal appraisal of the facts, the Commission analysed those aspects. In finding that the cartel had had an actual impact on the market, it relied on the fact that the agreements had been carefully implemented (recital 212), that the price of citric acid as announced to customers was applied by the cartel members (recital 213), that the cartel members had fixed sales quotas, adherence to which was constantly monitored, and set up a compensation system (recitals 214 and 215). Lastly, the Commission examined the arguments of the parties concerned, including the applicant, and gave a succinct but sufficient statement of reasons in that respect (recitals 226 to 228 of the Decision).

194 It follows that the Commission explained how, in its view, the cartel had had an actual impact on the citric acid market.

195 Consequently, the Decision contains a sufficient statement of reasons on this point.

B — *Adjustment of the fine by reference to the relative size of the undertakings concerned*

1. Arguments of the parties

196 Jungbunzlauer submits that when, in calculating the fines according to the gravity of the infringement, the Commission adjusted the amount of the fines on the basis of the size and the overall resources of the undertakings concerned, it did not take proper account of the applicant's very limited economic strength in relation to the other companies concerned and, in doing so, failed to observe the principles of proportionality and equal treatment, a 'principle of individual assessment of fines' and its own Guidelines.

197 Jungbunzlauer states that it is clear from recitals 240 to 246 of the Decision that, to take account of the size and the overall resources of the undertakings concerned, the Commission compared the worldwide turnover of the companies concerned, and even the groups to which they belonged, as shown in Table 3 of recital 50 of the Decision. On that basis, Jungbunzlauer observes that, to ensure that the fines had a sufficient deterrent effect, the Commission increased by 100% the starting amounts of the fines on ADM and HLR, and by 150% that on H&R.

198 Jungbunzlauer claims that, in applying this method of adjusting fines, the Commission obtains an absurd result because it grossly penalises companies which are clearly smaller, such as Jungbunzlauer, and attaches a much reduced deterrent effect to the fines on large companies.

199 Jungbunzlauer acknowledges that the calculation of the fine may involve taking account of numerous factors and that the Commission has a very broad discretion for that purpose. However, referring to the judgments in Case 183/83 *Krupp* v *Commission* [1985] ECR 3609, paragraph 37, Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 121, and Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 94, it submits that, in that context, considerable weight must be attached to the economic strength of the undertaking concerned.

200 With regard to the judgment in *Musique diffusion française and Others* v *Commission*, paragraph 199 above, Jungbunzlauer observes that that case involved a large undertaking which had participated in agreements relating to a product which accounted for only a small part of its overall turnover. According to Jungbunzlauer, in that case the Court of Justice, following the position taken by the Commission, clearly affirmed that the size and economic strength of the undertaking must be adequately reflected in the fine imposed (*Musique diffusion française and Others* v *Commission*, paragraph 199 above, paragraph 121). In so doing, according to Jungbunzlauer, the Court wished to avoid a large group having to pay a fine which, in relation to its economic strength, was relatively modest, solely on account of the limited importance of the product concerned in the overall turnover.

201 Jungbunzlauer submits that that is precisely what has happened in the present case, as shown by several comparisons.

202 Jungbunzlauer observes that, in the present case, compared with the economic capacity of all the undertakings to which the Decision was addressed, the starting amount calculated by reference to the gravity of the infringement affects the Jungbunzlauer group much more harshly than the other parties concerned.

203 Relying on the figures referred to in recitals 239 and 246 of the Decision, Jungbunzlauer produces the following table:

Undertaking	Overall turnover (million EUR)	Starting amount of fine (by reference to gravity of infringement) (million EUR)	Starting amount as % of overall turnover
Jungbunzlauer	314	21	6.69
HLR	18 403	42	0.23
ADM	13 936	42	0.30
H & R/Bayer AG	30 971	87.5	0.29
Cerestar/ Cerestar AG	1 693	3.5	0.20

204 According to Jungbunzlauer, it follows that, although HLR's turnover is 58.6 times greater than that of the Jungbunzlauer group and ADM's turnover is 44.38 times greater, the fines on those two companies were only doubled at that particular stage of calculating the fines. Likewise, although the turnover of the Bayer group, to which H&R belonged and which was used by the Commission when adjusting the fines (recitals 243 and 244) is 99.8 times greater than that of the Jungbunzlauer group, H&R's fine was multiplied by only 2.5, which is all the more surprising since the Bayer group had by far the largest market share of all the parties concerned.

205 In Jungbunzlauer's view, such unequal treatment cannot be justified because, apart from their size, all the companies to which the Decision was addressed were comparable amongst themselves in every respect with regard to their contribution to the infringement and their market position.

206 Furthermore, the Commission erred in rejecting the applicant's argument by referring to the size of its share of the citric acid market. First, it observes that the Jungbunzlauer group had a share of [*confidential*]% of the citric acid market, but that its fine was 23 times greater than that imposed on H&R, which however had a larger market share (22%). Secondly, it claims that the size of the market shares of the different undertakings had already been used by the Commission at an earlier stage of calculating the fine, namely when classifying the undertakings in three categories (recitals 233 to 239 of the Decision).

207 Disproportionate treatment of the smallest undertakings is also shown by a comparison of the starting amounts calculated by reference to the gravity of the infringement used by the Commission in relation to, on the one hand, Jungbunzlauer in the Decision, and, on the other hand, other parties in similar cases giving rise to decisions contemporaneous with the one challenged in the present case. Jungbunzlauer refers in that connection to the Commission's decisions in the so-called sodium gluconate case (Commission decision of 2 October 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.756 — Sodium gluconate) ('the sodium gluconate decision')); the amino acids case (Commission Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/36.545/F3 — Amino acids) (OJ 2001 L 152, p. 24) ('the amino acids decision')) and the vitamins case (Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1) ('the vitamins decision'). In those cases, the basic amounts chosen by the Commission for the different undertakings concerned were, as a percentage of their overall turnover, in the sodium gluconate case,

between 0.04 and 0.58%, in the amino acids case, between 0.24 and 1.59% and, in the vitamins case, between 0.7 and 2.0%, whereas the figure for the applicant in the present case is 6.69%.

208 Jungbunzlauer also compares the fines chosen in the Decision before reduction for cooperation (recitals 293 and 326 of the Decision) in relation to itself with those imposed by the Decision on HLR and ADM as a percentage of their overall turnover. In that respect, Jungbunzlauer observes that, when compared with the strength of the respective companies expressed in terms of overall turnover (see paragraph 203 above), the applicant's fine before reduction for cooperation (EUR 29.4 million or 9.36% of its overall turnover) is in percentage terms 21.8 times greater than the fine on HLR (EUR 79.38 million or 0.43% of HLR's overall turnover) and 16.4 times greater than ADM's fine (EUR 79.38 million or 0.57% of ADM's overall turnover).

209 Jungbunzlauer considers that the disproportionate nature of its fine in the present case is even more flagrant when the final amount of the fines chosen in the Decision concerning it is compared with those imposed on HLR and ADM as a percentage of their overall turnover. The applicant observes that, when compared with the strength of the respective companies expressed in terms of overall turnover (see paragraph 203 above), the final amount of the applicant's fine (EUR 17.64 million) is 16 times greater than the fine levied on HLR (EUR 63.5 million) and 20 times greater than ADM's fine (EUR 39.69 million).

210 In addition, Jungbunzlauer compares the final amounts of the fines in the Decision concerning it with those imposed in the sodium gluconate, amino acids and vitamins decisions and those in the Sun-Air/SAS and Maersk Air case (Commission Decision 2001/716/EC of 18 July 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP.D.2 37.444 — SAS/

Maersk Air and Case COMP.D.2 37.386 — Sun-Air v SAS and Maersk Air) (OJ 2001 L 265, p. 15)). According to Jungbunzlauer, it is clear that, when compared with the strength of the respective companies expressed in terms of overall turnover, the final amount of their fines represented only 0.06 and 2.61% of their turnover.

211 In the light of all the foregoing, Jungbunzlauer is of the opinion that, in the part of its calculation of the fines which is intended to give the fines a sufficient deterrent effect, the Commission ought to have made a downward correction in the fine to be imposed on the Jungbunzlauer group.

212 The Commission rejects the applicant's arguments.

2. Findings of the Court

(a) Introduction

213 According to settled case-law, the gravity of infringements must be determined by reference to numerous factors, such as the particular circumstances of the case and its context; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO and Others* v *Commission*, paragraph 136 above, paragraph 54; *Ferriere Nord* v *Commission*, paragraph 136 above, paragraph 33; and *HFB and Others* v *Commission*, paragraph 136 above, paragraph 443).

214 Likewise, it has consistently been held that the criteria for assessing the gravity of an infringement may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the market. It follows that, on the one hand, it is permissible, for the purpose of fixing a fine, to have regard both to the overall turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it is important not to confer on one or other of those figures an importance which is disproportionate in relation to other factors and that the fixing of an appropriate fine cannot be the result of a simple calculation based on overall turnover (see, to that effect, *Musique diffusion française and Others* v *Commission*, paragraph 199 above, paragraphs 120 and 121; *Parker Pen* v *Commission*, paragraph 199 above, paragraph 94; Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 176; *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 177 above, paragraph 187; and *HFB and Others* v *Commission*, paragraph 136 above, paragraph 444).

215 In the present case, the Commission took account of the turnover from the sale of the products in question and the overall turnover of the undertakings concerned. After finding that the infringement should be deemed 'very serious' for the purpose of the second paragraph of Section 1A of the Guidelines (recital 230 of the Decision), the Commission applied those two criteria in weighting the amount of fines in the category of very serious infringements for which the Guidelines lay down 'likely fines' of over EUR 20 million.

216 It is clear from recitals 233, 234 and 240 of the Decision that the Commission relied on the fourth and sixth paragraphs of Section 1A of the Guidelines. In those passages of the Guidelines, the Commission stated essentially that where an infringement involves several undertakings and there is considerable disparity between the sizes of the undertakings committing infringements, differential

treatment will be applied to the undertakings concerned in order to take account of their actual economic ability to cause significant damage to competitors and to set the fine at a level which ensures that it has a sufficiently deterrent effect.

217 Accordingly, first, on the basis of the turnover of the parties concerned from sales of the products in question, the Commission classified the parties into three categories. The purpose of this adjustment was, as the Commission points out in recital 234 of the Decision, to take account of the real impact of each party's conduct on competition. In so doing, the Commission also pursued a deterrent purpose in making it plain that it would penalise more heavily undertakings participating in a cartel on a market in which they had significant weight.

218 In that context, as the applicant had a medium-sized share of the world citric acid market, the Commission placed it in the second category of undertakings for which it set a starting amount of EUR 21 million.

219 Next, on the basis of the overall turnover of the parties concerned, the Commission considered it appropriate to adjust the starting amount of the fines for three of them on the ground that their size and global resources were such that, unless those amounts were increased, the fine would not have a deterrent effect as it was far too low a fraction of their overall turnover.

220 The applicant's criticism relates only to that particular stage of calculating the fine, as described in the preceding paragraph. It observes essentially that, in merely multiplying by 2 or 2.5 the starting amount of the fine for cartel members which constitute or form part of large multinational groups, but in failing at the same time to reduce the starting amount for considerably smaller undertakings, the Commission discriminated against the latter as compared with the former. Without being contradicted on this point, the applicant infers from the recitals of the

Decision that the basic amount of its fine by reference to the gravity of the infringement represents 6.69% of its own overall turnover, whereas for the large multinational groups (in the present case HLR, ADM and Bayer, to which H&R belongs), the basic amount represents between 0.23 and 0.30% of their respective overall turnover, even after multiplication to take account of their size and global resources.

221 In that context, the applicant puts forward three pleas alleging, first, infringement of a 'principle of individual assessment of fines' and of the Guidelines, second, of the principle of proportionality and, third, of the principle of equal treatment.

(b) The complaints concerning infringement of a 'principle of individual assessment of fines' and of the Guidelines

222 The applicant pleads infringement of a 'principle of individual assessment of fines' and of the Guidelines and submits in essence that the Commission had an obligation to set fines on the basis of a percentage of the overall turnover of each undertaking concerned.

223 It must be observed that the Court has held on several occasions that, on the basis of the principles laid down in settled case-law, it is open to the Commission, in accordance with its Guidelines, not to set fines by reference to the turnover of each of the undertakings concerned in the relevant market, but to apply, as the starting point of its calculation for each undertaking, an absolute figure fixed according to the actual nature of the infringement, that figure then being adjusted for each undertaking on the basis of several factors (see, to that effect, Joined Cases 96/82 to

102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraphs 51 to 53; *LR AF 1998* v *Commission*, paragraph 88 above, paragraph 281; and Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraphs 384, 385, 416 and 437).

224 The applicant does not dispute that, in the present case, the Commission used this method, as laid down by the Guidelines.

225 Consequently, the applicant cannot plead infringement of the Guidelines. With regard to infringement of the alleged 'principle of individual assessment of fines', it is sufficient to note that the applicant has not defined this principle specifically and that it has not been expressly recognised in the case-law. Consequently, reliance on that principle by the applicant cannot in itself cast doubt on the validity of the Decision. The applicant's submissions concerning infringement of the Guidelines and of an alleged 'principle of individual assessment of fines' must therefore be dismissed.

(c) Infringement of the principle of proportionality

226 The principle of proportionality requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued (Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997, paragraph 144, and case-law cited, and Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraph 201).

227 In relation to the calculation of fines, it has consistently been held that the gravity of infringements has to be determined by reference to numerous factors and that it is important not to confer on one or other of those factors an importance which is disproportionate in relation to other factors (see paragraphs 213 and 214 above).

228 The principle of proportionality in this context requires the Commission to set the fine proportionately to the factors taken into account to assess the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified (see, to that effect, Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 106; *CMA CGM and Others* v *Commission*, paragraph 223 above, paragraphs 416 to 418; and Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 1541).

229 In the present case, after determining that the infringement was, by nature, a very serious infringement liable to a fine of more than EUR 20 million, the Commission proceeded to weight the starting amount of the fine. For that purpose, in accordance with the case-law cited in paragraph 214 above, the Commission took account, first, of the quantity and value of the goods in respect of which the infringement was committed for each undertaking involved, giving an indication of the extent of the offence committed by those undertakings in the market for the relevant goods and, second, of the size and economic strength of each undertaking. Although the Commission took account of those two criteria in one and the same calculation, they are two separate criteria. Consequently, it is necessary to ascertain separately whether the Commission attached disproportionate importance to one of the two.

230 First, by setting the starting amount at a higher level for the companies with a relatively larger market share than the others in the market concerned, it took account of the actual influence of the company on that market and, thereby, of the company's specific responsibility for maintaining free competition as being a subjective factor in the gravity of the conduct of the companies concerned. That

factor is the expression of the higher degree of responsibility of the companies with a relatively larger market share than the others in the market concerned for the damage caused to competition and, in the final analysis, to consumers by forming a secret cartel.

231 In the present case, by placing the applicant in the second category of undertakings concerned and by setting as the applicant's starting point the same amount as that for two other companies which had in that market a share equivalent to that of the applicant, the Commission did not determine that amount disproportionately, having regard to the gravity of the applicant's offence and to the need to ensure that the fine had a deterrent effect in view of such gravity. This assessment is not affected by the fact that, in terms of overall size, the other companies were larger than the applicant. The effect of the applicant's actions on the market justifies the Commission's assessment at this stage of calculating the fine.

232 Second, by multiplying the starting amount for ADM, HLR and H&R, the Commission properly assessed the size and global resources of the companies concerned and thus pursued the aim of ensuring that the fines had a deterrent effect.

233 Jungbunzlauer cannot reasonably argue that, by virtue of the principle of proportionality, in the context of the same calculation the Commission ought to have reduced the applicant's fine on the ground that, comparing it with the applicant's overall turnover, it exceeded the limits of what was appropriate and necessary to achieve the desired aim of ensuring that the fine had a deterrent effect.

234 As stated in paragraph 231 above, in setting the fine, the Commission did not take into account a disproportionate amount, having regard to the extent of the applicant's infringement in the market for the goods in question. This assessment is not affected by the fact that, in this case, the fine represents 6.69% of the turnover of the undertaking concerned.

235 Consequently, the plea of infringement of the principle of proportionality must be dismissed.

(d) Infringement of the principle of equal treatment

236 The principle of equal treatment is infringed where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (*BPB de Eendracht* v *Commission*, paragraph 88 above, paragraph 309, and case-law cited, and Case T-67/01 *JCB Service* v *Commission* [2004] ECR II-49, paragraph 187).

237 In the present case, the Commission does not dispute that the applicant was in a situation comparable to that of the other undertakings to which the Commission attributed responsibility for the infringement, as the object of deterrence applied to the applicant just as much as to the other undertakings concerned. Likewise, the Commission does not dispute that, so far as the relationship between the fine and the turnover of the parties is concerned, a factor which the Commission took into account in fixing the amount of the fines of the parties concerned by reference to the gravity of the infringement, the basic amount of the applicant's fine by reference to such gravity accounts for 6.69% of its overall turnover, whereas the corresponding amount for the large multinational groups (HLR, ADM and Bayer, to which H&R

belongs) is between 0.23 and 0.30% of their respective overall turnover, even after multiplication to take account of the size and global resources of the latter undertakings.

238 However, unless the fine is set at a level proportionate to the turnover of the undertakings concerned, a certain difference in the treatment of the undertakings concerned is inherent in the application of the method chosen by the Guidelines to attain the aim of deterrence, a method which has been found legal by the Community Courts (*LR AF 1998* v *Commission*, paragraph 88 above, paragraph 222).

239 Moreover, since the Commission's assessment concerning the proportionate nature of the starting amount of the fine has not been found to be incorrect (see paragraphs 226 to 235 above), the applicant's argument in reality amounts to requesting the Court to review the legality of the fines imposed on the large undertakings with which the applicant compares its fine. However, the applicant cannot claim a right to bring an action in that respect. Observance of the principle of equal treatment must be reconciled with observance of the principle that no person may seek to rely, in his own favour, on an illegal act in favour of others (*HFB and Others* v *Commission*, paragraph 136 above, paragraph 515, and case-law cited).

240 Therefore the plea of infringement of the principle of equal treatment must be dismissed.

IV — *Attenuating circumstances*

241 Jungbunzlauer puts forward two pleas alleging infringement, first, of the Guidelines and, second, of the obligation to state reasons.

A — *Infringement of the Guidelines*

242 The applicant claims that, in accordance with the first and second indents of Section 3 of the Guidelines, the Commission ought to have allowed it the benefit of attenuating circumstances in respect of, first, the exclusively follow-my-leader role of Jungbunzlauer GmbH in the infringement and, second, the non-implementation in practice of the agreements by Jungbunzlauer GmbH.

1. The exclusively follow-my-leader role of Jungbunzlauer GmbH in the infringement

(a) Arguments of the parties

243 The applicant considers that, in accordance with the first indent of Section 3 of the Guidelines, the Commission ought to have allowed it the benefit of attenuating circumstances in respect of the exclusively follow-my-leader role of Jungbunzlauer GmbH in the infringement. The applicant observes that the benefit of a 'follow-my-leader' role, a concept not defined in the Guidelines, cannot be ruled out merely because an undertaking obeys the rules of the cartel, at least in part. In its view, it is characteristic of a follow-my-leader role that, having regard to the considerable pressure from the other members of the cartel, the passive member takes part, to the most limited extent possible, in implementing the agreements by taking on certain functions in the cartel and taking part in negotiations. Any other interpretation would result in the follower risking penalties within the cartel and suffering retaliatory measures from the other members.

244 Jungbunzlauer claims that, at the beginning of the cartel, Jungbunzlauer GmbH was not in a position to evade the agreements and was more or less compelled to join in

the agreements in 1991. As a small supplier specialising in citric acid, it ran the risk of being kept out of the market by bigger competitors which were much stronger financially (with turnover up to 58.6 times greater than that of the Jungbunzlauer group) and which had a very large production base, unlike Jungbunzlauer GmbH. Furthermore, the applicant submits that between 1991 and 1995 the Jungbunzlauer group was in a very difficult financial situation, which meant that Jungbunzlauer GmbH would not have been able to retain its independence if it had not joined the cartel at the beginning of 1991. In addition, the applicant points out that 40% of the total production cost of citric acid is accounted for by the cost of raw materials, including glucose. However, some of that was produced by other members of the cartel, so that they were able to influence considerably the cost price of Jungbunzlauer GmbH's citric acid-based products; at that time, Jungbunzlauer GmbH had practically no alternative sources of supply.

245 Jungbunzlauer criticises the position taken by the Commission which, in its view, in recitals 282 and 284 of the Decision summarily rejected those arguments on the ground that, from 1994 onwards, Jungbunzlauer took over responsibility for the collection of sales data and that its CEO chaired the cartel meetings. According to the Commission, that was sufficient to demonstrate that the applicant's 'involvement in the cartel was active and went much further than it acknowledges' (recital 284 of the Decision).

246 Jungbunzlauer considers that the Commission exaggerated the importance of the chairmanship of cartel meetings. As the Commission stated in recital 120 of the Decision, that function was connected with the chairmanship of the European Citric Acid Manufacturers' Association, Jungbunzlauer's representative having taken over that role only because it was laid down by the rules of the cartel on the basis of a system of rotation. According to Jungbunzlauer, that function consisted mainly in ensuring that the data collection system operated properly and was a 'thankless' task involving mostly administrative aspects. In any event, the function did not entail any possibility of greater influence within the cartel. Furthermore, referring to the arguments put forward in paragraph 244 above, the applicant considers that it was not in a position to refuse the chairmanship. In addition, the role of chairman, as

understood by the Commission, was inconsistent with the fact that Jungbunzlauer GmbH was always being criticised for not having fully complied with the cartel agreements. Lastly, the applicant considers that, in the context of the relative economic strength described in paragraph 244 above, it seems unrealistic to assume that a medium-sized family undertaking like the Jungbunzlauer group might have been able to impose any kind of measure on the other members of the cartel.

247 Jungbunzlauer submits that taking over the chairmanship of cartel meetings could at most prove that Jungbunzlauer had an important role in the cartel only from 1994, that is to say, in relation to the last year of the period chosen by the Commission. That circumstance can in no way however refute the arguments referred to in paragraphs 243 and 244 above. The taking of such a position approximately three years later certainly does not obviate the fact that, in 1991, Jungbunzlauer was compelled to join the cartel.

248 Likewise, Jungbunzlauer submits, the Commission is wrong in relying on the fact that the applicant regularly attended cartel meetings in the person of its directors. The applicant claims that, first, that was not the case with regard to Messrs R. and H. and, secondly, that a relatively small undertaking such as Jungbunzlauer is characterised by a fairly 'informal' hierarchy. The Commission states, in recital 122 of the Decision and in its statement in defence, that the applicant had the role of 'spokesman' in relation to measures by the cartel against Chinese producers; on this point it observes that this was only a matter of preparing an anti-dumping complaint to the Commission, which is a legitimate means of defence against distortions of competition caused by imports below cost price and not a breach of Article 81 EC.

249 Lastly, Jungbunzlauer complains that the Commission appropriated for itself the arguments of two members of the cartel in the course of the administrative procedure, namely H&R and HLR, summarised in recitals 279 to 281 of the

Decision. On this point the applicant submits, first, that the statements of those two undertakings are incorrect and, secondly, that they have no evidential value because they are statements by co-accused which, naturally, seek to shift to other undertakings the main contribution to the infringement and, third, that the Commission did not refer to those statements in the statement of objections so that, by relying on them in the Decision, it violated Jungbunzlauer's rights of defence (see, in respect of this third factor, paragraph 336 below).

250 The Commission rejects the applicant's arguments.

(b) Findings of the Court

251 The third indent of Section 3 of the Guidelines states that the basic amount will be reduced where there are attenuating circumstances such as an 'exclusively passive or "follow-my-leader" role in the infringement'.

252 In that connection, it is clear from the case-law (Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR I-1181, paragraph 331) that the factors likely to reveal the passive role of an undertaking within a cartel include the significantly more sporadic nature of its participation in the meetings by comparison with the other members of the cartel (*BPB de Eendracht* v *Commission*, paragraph 88 above, paragraph 343) and also its belated entry into the market where the infringement occurred, irrespective of the duration of its participation in the infringement (see, to that effect, Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 100) as well as the

existence of express declarations to that effect made by representatives of other undertakings which participated in the infringement (Case T-317/94 *Weig* v *Commission* [1998] ECR II-1235, paragraph 264). In addition, the Court has held that 'an exclusively passive role' of a member of a cartel implies that it adopts a 'low profile', that is to say, it does not actively participate in the making of the anti-competitive agreement or agreements (Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 167).

253 In the Decision, the Commission does not describe Jungbunzlauer as a leader, but denies that it had a passive or follow-my-leader role in view of the fact that, as from 1994, Jungbunzlauer took over responsibility for the collection of sales data and its CEO chaired the cartel meetings (recital 284 of the Decision).

254 First, in the present case, the applicant cannot properly argue that it was compelled to take part in the cartel in order to claim the benefit of attenuating circumstances. Even if it were shown that the other members of the cartel brought economic pressure to bear on Jungbunzlauer GmbH to join in the cartel agreements, nevertheless, once it had joined the cartel, it complied with the decisions of the cartel members without taking an exclusively passive or follow-my-leader role in the infringement. In the Guidelines, the Commission points out that the fine may be reduced in the case of an 'exclusively' passive or follow-my-leader role. Consequently, it is not sufficient that the applicant adopted a 'low profile' during certain periods of the cartel or in relation to certain cartel agreements.

255 Secondly, this finding is confirmed by the fact that Jungbunzlauer regularly attended cartel meetings.

256 Thirdly, the applicant cannot properly rely on the economic difficulties it encountered in the period covered by the cartel. It is precisely because of the economic difficulties encountered by all undertakings in the citric acid market at the end of the 1980s that some of them, including the applicant, decided to engage in anti-competitive conduct. As a general rule, cartels like those in the present case come into being when a sector encounters problems (see, to that effect, *Tokai Carbon and Others* v *Commission*, paragraph 252 above, paragraph 345).

257 Fourthly, the applicant is wrong in stating that the chairmanship of cartel meetings entailed only administrative tasks and gave it no greater influence within the cartel. It is well settled that convening meetings, proposing an agenda and distributing preparatory documents for meetings are incompatible with a passive or follow-my-leader role adopting a low profile. Such initiatives show the applicant's favourable and active attitude to the constitution, continuation and control of the cartel. Jungbunzlauer is also wrong in playing down the fact that Jungbunzlauer's CEO himself took part in cartel meetings, given the lack, within that undertaking, of a hierarchical structure equivalent to that of the other cartel members. Even if those factors were proved, they could at the most be relied on to show that the applicant did not have the role of a leader within the cartel, but they are not such as to show that the applicant's role was 'exclusively passive or follow-my-leader'. It is common ground, however, that the Commission did not regard the applicant as one of the leaders of the cartel.

258 Consequently, the Commission did not infringe the Guidelines in refusing the applicant the benefit of attenuating circumstances by reason of the exclusively passive or follow-my-leader role said to have been taken by Jungbunzlauer GmbH in the infringement.

2. The non-implementation in practice of the cartel agreements by Jungbunzlauer GmbH

(a) Arguments of the parties

259 Jungbunzlauer submits that, in accordance with the second indent of Section 3 of the Guidelines, the Commission ought to have allowed it the benefit of mitigating circumstances by reason of the non-implementation in practice of the cartel agreements by Jungbunzlauer GmbH. Jungbunzlauer claims that, although representatives of Jungbunzlauer GmbH attended meetings regularly, that company followed an independent sales policy oriented towards competition. In addition, more than any other cartel member, Jungbunzlauer GmbH had consistently and over a relatively long period evaded attempts by the other members to 'discipline' its policy with regard to conditions of sale and prices.

260 First, Jungbunzlauer claims that, as appears in recital 72 of the Decision, Jungbunzlauer GmbH's conduct on the market up to 1990 was the reason for the decline in prices of citric acid in Europe which, ultimately, led to the formation of the cartel. It observes that, between 1970 and 1990, Jungbunzlauer GmbH multiplied its sales of citric acid by 30 whereas, over the same period, the total market share rose by scarcely 96%. Those market shares were gained at the expense of the major suppliers of citric acid established in the market. The cartel therefore proved to be a means of subjecting it to a common discipline, as appears from the account of the first meeting of the cartel at Basle on 6 March 1991, given in its reply to the statement of objections. That first meeting proves that the agreements were, from the beginning, contrary to the economic interests of Jungbunzlauer GmbH.

261 Secondly, Jungbunzlauer asserts that, throughout the existence of the cartel, Jungbunzlauer GmbH seriously disrupted the work of the cartel and reduced its

effects on the market. Accordingly, although it attended most of the cartel meetings, Jungbunzlauer GmbH was perceived by the other members as a 'spoilsport'.

262 Jungbunzlauer states that, during the first phase of the cartel, which was from March 1991 to the first half of 1993 (recital 90 of the Decision), Jungbunzlauer GmbH attempted mainly to limit the effectiveness of the cartel. Its principal concern was to prevent the setting-up of a compensation system for penalising failure to abide by quotas. This is proved by the conduct of the representatives of Jungbunzlauer GmbH at the meeting in Jerusalem in May 1992, as described in the applicant's letter of 29 April 1999, its statement of 21 May 1999 under the Leniency Notice and in its reply to the statement of objections.

263 With regard to the second phase of the cartel, which lasted from the second half of 1993 to May 1995 (recital 91 of the Decision), Jungbunzlauer observes that it was increasingly difficult for the parties concerned to secure adherence to the agreed prices. The applicant submits that, apart from imports from China, it was Jungbunzlauer GmbH that was mainly responsible for that state of affairs because of its attempt to leave the cartel.

264 According to Jungbunzlauer, as appears from recital 117 of the Decision, from the beginning of 1993 growing disagreement began to surface among the members of the cartel, and Jungbunzlauer GmbH was identified as being mainly responsible because it did not adhere to the agreements and refused, according to the other members, to submit to discipline. This was also confirmed by the minutes of the FBI hearing relating to the Chicago meeting in March 1993. The applicant adds that, as it had already informed the Commission in its letter of 29 April 1999, in its statement of 21 May 1999 under the Leniency Notice and in its reply to the statement of objections, and as also appears from the statements of other members of the cartel and the FBI minutes annexed to the reply to the statement of objections, in the course of various meetings between 1993 and 1995 Jungbunzlauer

GmbH was criticised by the other members for opposing anti-competitive measures and for not having implemented some of the agreements. Lastly, at the beginning of 1995, the expulsion of Jungbunzlauer GmbH from the cartel was even being contemplated and, as no solution was found, the activities of the cartel came to an end in the course of a meeting on 22 May 1995.

265 Thirdly, the applicant considers that the non-implementation in practice of the cartel agreements by Jungbunzlauer GmbH appears also in relation to the prices charged by that company. The applicant refers to four graphs which it had sent to the Commission in connection with its reply to the statement of objections. The graphs compared the cartel's target prices with those actually charged by Jungbunzlauer GmbH in the market. According to the applicant, these show that offers by Jungbunzlauer GmbH were generally below the target prices and, therefore, that to a large extent it undercut the prices fixed by the cartel, and not just occasionally. Contrary to the Commission's argument, Jungbunzlauer considers that the graphs do not show parallel movement of the target prices and the actual prices of Jungbunzlauer GmbH.

266 The Commission rejects the applicant's arguments.

(b) Findings of the Court

267 In the second indent of Section 3 of the Guidelines, it is stated that the fine will be reduced where there are attenuating circumstances such as non-implementation in practice of the cartel agreements.

268 For that purpose, it is necessary to check whether the circumstances referred to by the applicant are such as to establish that, during the period in which it was a party to the offending agreements, it actually declined to apply them by adopting competitive conduct on the market (see, to that effect, *Cimenteries CBR and Others* v *Commission*, paragraph 141 above, paragraphs 4872 to 4874, and *Cheil Jedang* v *Commission*, paragraph 252 above, paragraph 192).

269 It is settled case-law that, when the amount of a fine to be imposed is being determined, the fact that an undertaking proven to have participated in collusion on prices with its competitors did not behave on the market in the manner agreed with those competitors is not necessarily a matter which must be taken into account as an attenuating circumstance. An undertaking which, despite colluding with its competitors, follows a more or less independent policy in the market may simply be trying to exploit the cartel for its own benefit (*Cascades* v *Commission*, paragraph 141 above, paragraph 230, and *Cheil Jedang* v *Commission*, paragraph 252 above, paragraph 190).

270 In any case, it has already been found in the present case in paragraphs 183 and 184 above that the prices fixed by the cartel and the applicant's prices were to some extent parallel, although the latter were generally lower than the former. In a situation of that kind, the applicant cannot properly claim in exoneration that the cartel was contrary to its economic interests, that it disrupted the cartel's work and reduced its effectiveness and generally invoiced prices below those which had been agreed.

271 Consequently, the Commission did not infringe the Guidelines in refusing the applicant the benefit of attenuating circumstances for the non-implementation in practice of the cartel agreements by Jungbunzlauer GmbH.

B — *Infringement of the obligation to state reasons*

272 Jungbunzlauer submits, in substance, that the Decision does not provide an adequate statement of reasons concerning the non-implementation in practice of the cartel agreements and its follow-my-leader role within the cartel on the ground that the Commission failed to state its position concerning the different arguments put forward by it in the course of the administrative procedure.

273 The Commission seeks the dismissal of this plea.

274 The Court refers to the cases cited in paragraph 100 above and observes that, in recital 284 of the Decision, the Commission stated that 'the mere fact that from 1994 onwards Jungbunzlauer took over responsibility for the collection of sales data and that its CEO chaired the cartel meetings suffices to demonstrate that Jungbunzlauer's involvement in the cartel was active and went much further than it acknowledges'.

275 Furthermore, in recitals 218 and 219 of the Decision, the Commission examined and rejected the applicant's assertion that it did not play an active part in the cartel and did not implement its decisions.

276 In addition, regarding the non-implementation of the agreements, in recital 285 of the Decision, the Commission referred to its analysis in recitals 212 to 218 of the same Decision, where it described in detail the implementation of the cartel agreements by the parties concerned in relation to citric acid prices, quotas and the compensation system.

277 Therefore, contrary to the applicant's submission, the Decision does provide an adequate statement of reasons on this point.

V — *Failure to take account of fines in other countries*

A — *Arguments of the parties*

278 Jungbunzlauer considers that, by refusing to take account of fines already imposed in proceedings in the United States and Canada for infringing the competition rules of those countries, and by refusing to reduce the fine imposed in the Decision on the same grounds, the Commission exceeded the limits of its discretion.

279 Jungbunzlauer observes that, in the proceedings in the United States, the Jungbunzlauer group concluded a plea agreement with the American competition authorities in 1997 in which it undertook to pay a fine of USD 11 million. According to the terms of that agreement, the undertaking relates not only to the parts of the agreements that affected the United States market, but also the parts which were considered to have been implemented in non-member countries. In Sections 2 and 4(b) of the plea agreement, the United States authorities, in calculating the fine, took account of the fact that the cartel was worldwide ('in the United States and elsewhere'). Jungbunzlauer adds that, in that context, the United States authorities imposed for the first time a much higher fine in referring to the international nature of the agreements. Consequently, the proceedings in the United States also relate to all the agreements and all the acts of the relevant undertakings for implementing them in so far as they relate to the European market. Therefore the operations described in the statement of objections and their repercussions on the European market have already been sanctioned by a fine.

280 The applicant likewise submits that the Canadian competition authorities had also instituted proceedings which may have led to a fine under antitrust law on the basis of the same agreements. In a plea agreement of 1998, the Jungbunzlauer group agreed to pay a fine of CAD 2 million (EUR 1.2 million) to put an end to the proceedings instituted by the Canadian authorities on the basis of the same agreements.

281 In that context, Jungbunzlauer acknowledges, first, that the principle *ne bis in idem* does not as such apply in the present case, as it involves the relationship between national and Community penal provisions. Jungbunzlauer adds, however, that by virtue of the general principle of natural justice, recognised as such by the Community Courts (Case 14/68 *Wilhelm and Others* [1969] ECR 1, paragraph 11, and Case T-149/89 *Sotralentz* v *Commission* [1995] ECR II-1127, paragraph 29), in the present case the Commission ought to have taken account of the idea underlying the principle of *ne bis in idem*. Jungbunzlauer asserts that the present case relates to a worldwide market in which the cartel agreements had international repercussions and that the United States and Canadian authorities imposed fines for the same facts as the Commission. Therefore, in its view, a penalty imposed by the authorities of a non-member country must affect the Commission's calculation of the fine, at least where the Commission and the said authorities have to take cognisance of the same facts. This view is shared by numerous legal commentators, including former officials of the Commission. Furthermore, according to Jungbunzlauer, in the judgment in Case 7/72 *Boehringer* v *Commission* [1972] ECR 1281, paragraph 3, the Court of Justice considered the question whether fines imposed in non-member countries should be taken into account where the actions complained of are identical. In that judgment, the Court held that, in the setting of the amount of the fine, account must not be taken of fines already imposed abroad for the sole reason that the actions complained of are not identical. This shows that they must be taken into account if the actions are identical.

282 Next, Jungbunzlauer claims that several of the aims of imposing a fine, in particular deterrence and the suppression of enrichment, had already been attained by the penalties imposed in non-member countries. In that connection, Jungbunzlauer emphasises that, in the criminal proceedings in the United States and Canada, it was

allowed by reason of its limited resources to pay the fine in instalments over several years. The financial capacity of the Jungbunzlauer group has already been seriously affected by the considerable fines imposed in the United States and Canada. Consequently, those fines must be taken into account from the viewpoint of the aims of imposing a fine.

283 Lastly, according to Jungbunzlauer, the Commission is wrong in objecting that the United States and Canadian authorities have no power to impose fines for restrictions of competition in Community territory because it is clear from the wording of the plea agreement with the United States authorities that they are not limited to the repercussions on the market of that country.

284 The Commission contends that this plea must be dismissed.

B — *Findings of the Court*

285 It must be observed that the principle *ne bis in idem* prohibits the same person from being sanctioned more than once for the same unlawful conduct in order to protect one and the same legal interest. The application of that principle is subject to three cumulative conditions: the identity of the facts, the unity of offender and the unity of legal interest protected (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 132 above, paragraph 338).

286 The Community case-law has accordingly held that an undertaking may be made defendant in two parallel sets of proceedings concerning the same infringement and,

thus, incur concurrent sanctions, one imposed by the competent authority of the Member State in question, the other a Community sanction, to the extent that the two sets of proceedings pursue different ends and that the legal rules infringed are not the same (*Wilhelm and Others*, paragraph 281 above, paragraph 11; Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 191; and *Sotralentz* v *Commission*, paragraph 281 above, paragraph 29).

287 It follows that the principle *ne bis in idem* cannot, a fortiori, apply in a case such as the present, where the procedures conducted and penalties imposed by the Commission on the one hand and the United States and Canadian authorities on the other clearly pursue different ends. The aim of the former is to preserve undistorted competition within the European Union and the EEA, whereas the aim of the latter is to protect the United States and Canadian markets (see, to that effect, *Tokai Carbon and Others* v *Commission*, paragraph 252 above, paragraph 134, and case-law cited). The condition of the unity of the legal interest to be protected, which is necessary for the principle *ne bis in idem* to apply, is accordingly not fulfilled.

288 Therefore, the Court finds that the principle *ne bis in idem* does not apply to the present case, as argued by Jungbunzlauer and referred to in paragraph 281 above.

289 Jungbunzlauer nevertheless submits that, although that principle does not apply, the Commission, in setting the fine, ought to have taken account of the fines imposed by the American and Canadian authorities which took cognisance of the same actions. According to Jungbunzlauer, this is required by the principle of natural justice and by the attainment of the objectives of a fine, namely deterrence and the suppression of enrichment.

290 With regard to the principle of natural justice, it must be observed that the possibility of concurrent sanctions, one Community, the other national, resulting from two parallel procedures pursuing different ends, the acceptability thereof deriving from the special system of sharing jurisdiction between the Community and the Member States with regard to cartels, is subject to the principle of natural justice. This means that, when setting fines, the Commission must take account of penalties which have already been borne by the same undertaking for the same conduct, where they have been imposed for infringements of the cartel law of a Member State and, consequently, have been committed on Community territory (*Wilhelm and Others* paragraph 281 above, paragraph 11; *Tréfileurope* v *Commission*, paragraph 286 above, paragraph 191; and *Sotralentz* v *Commission*, paragraph 281 above, paragraph 29).

291 However, according to the same case-law, the obligation to take account of the principle of natural justice follows, on the one hand, from the close interdependence of the national markets of the Member States of the common market and, on the other, from the special system of the sharing of jurisdiction between the Community and the Member States with regard to cartels in the same territory.

292 In the present case, however, those factors do not arise and therefore the Commission cannot be criticised for having disregarded that obligation.

293 This finding is not affected by the judgment in *Boehringer* v *Commission*, paragraph 281 above, relied on by Jungbunzlauer. In that case, the Court of Justice did not state that the Commission ought to have offset a fine imposed by the authorities of a non-member country where the acts found by the Commission and by those authorities to have been committed by an undertaking are identical, but stated that this question would have to be settled when it arose (*Boehringer* v *Commission*, paragraph 281 above, paragraph 3).

294 In the present case, even if it were accepted that the principle of natural justice requires the Commission to take account of fines imposed by the authorities of non-member countries where the actions found by the Commission to have been committed by an undertaking are the same as those found by an authority of a non-member country to have been committed by the same undertaking, it is clear that Jungbunzlauer has failed to show that the American and Canadian authorities were concerned with acts implementing the cartel or with effects of the cartel other than those affecting their respective territory.

295 The mere reference, in the plea agreement concluded with the United States authorities, to the fact that the cartel related to 'the United States and elsewhere' does not prove that, when calculating the fine, the United States authorities took account of acts implementing the cartel or effects of the cartel other than those relating to American territory, and in particular the EEA (see, to that effect, *Tokai Carbon and Others* v *Commission*, paragraph 252 above, paragraph 143). Applying the law in that way would be likely to impinge upon the territorial jurisdiction of the Commission.

296 Likewise, with regard to the plea agreement with the Canadian authorities, Jungbunzlauer has failed to prove that, when setting the fine, they were concerned with acts implementing the cartel or with effects of the cartel other than those affecting their respective territory, particularly the EEA.

297 In relation to the deterrent effect of fines already imposed and the suppression of enrichment by reason of the fines already imposed, the Court observes that the Commission's power to impose fines on undertakings which, intentionally or negligently, commit an infringement of Article 81(1) EC or Article 82 EC is one of the means conferred on the Commission to enable it to carry out the task of supervision entrusted to it by Community law. That task encompasses the duty to pursue a general policy to apply, in competition matters, the principles laid down by

the Treaty and to guide the conduct of undertakings in the light of those principles (*Musique diffusion française and Others* v *Commission*, paragraph 199 above, paragraph 105).

298 It follows that the Commission has the power to decide the level of fines in order to reinforce their deterrent effect when infringements of a particular type, although established as being unlawful at the outset of Community competition practice, are still relatively frequent on account of the profit that certain of the undertakings concerned are able to derive from them (*Musique diffusion française and Others* v *Commission*, paragraph 199 above, paragraph 108).

299 Jungbunzlauer cannot properly claim that the suppression of the company's enrichment by reason of the fines already imposed necessarily justifies a reduction in the fine imposed at Community level, since it is the Commission which must ensure that fines have a deterrent effect.

300 Furthermore, Jungbunzlauer cannot properly claim that deterrence was unnecessary in relation to itself on the ground that it had already been fined for the same actions by the courts of non-member countries. The Commission's aim of deterrence relates to the conduct of undertakings within the Community or the EEA. Consequently, the deterrent effect of a fine imposed on Jungbunzlauer for infringing the Community competition rules cannot be assessed by reference solely to Jungbunzlauer's specific situation or by reference to whether it has complied with the competition rules in non-member countries outside the EEA (see, to that effect, *Tokai Carbon and Others* v *Commission*, paragraph 252 above, paragraphs 146 and 147).

301 Consequently, the plea that no account was taken of fines imposed in other countries must be dismissed.

VI — *Maximum amount of fines provided for by Article 15(2) of Regulation No 17*

A — *Introduction*

302 Jungbunzlauer observes that, in recital 293 of the Decision, the Commission reduced the fines for Cerestar and H&R in order not to exceed the maximum limit laid down by Article 15(2) of Regulation No 17. Jungbunzlauer submits that, in this context, the Commission made errors of assessment and infringed the principle of equal treatment and the obligation to state reasons.

303 Jungbunzlauer sets out its present submissions in three limbs, claiming that, in calculating the limit on fines laid down in Article 15(2) of Regulation No 17, the Commission, first, refused to take account of the fines imposed in the so-called sodium gluconate case; secondly, took into account the turnover of Jungbunzlauer Holding AG; and, thirdly, took no account of the fines imposed in other countries.

B — *Refusal to take account of the fines imposed in the so-called sodium gluconate case*

1. Arguments of the parties

304 Jungbunzlauer submits that the Commission infringed Article 15(2) of Regulation No 17 in failing, so as not to exceed the maximum amount of fines as laid down by that provision, to take into account the fine imposed on it in the sodium gluconate

case approximately two months before the adoption of the decision in the present case. It states that, if the Commission had added the two fines together, the application of the maximum amount rule laid down in Article 15(2) of Regulation No 17 would have entailed a reduction in the fine.

305 According to Jungbunzlauer, the Commission artificially severed the two cases. It submits that citric acid and sodium gluconate are related and belong to the same family of products because the raw material is the same for both products, the production processes are largely the same, both products are to a large extent sold through the same distribution channels and they are sold to the same buyers.

306 The difference that exists between the classes of participants in the two cases is not persuasive because the joinder of factual situations cannot depend on the individual decision of an undertaking to produce or not to produce a particular product. In addition, contrary to the Commission's argument, a comparison of the periods of the infringement in the two cases pleads in favour of a single decision for both cases. Jungbunzlauer adds that the competent authorities in the United States and Canada joined the cases in a single procedure and imposed a single fine for the infringement relating to the two products. Lastly, the applicant submits that the vitamins decision, in which the Commission dealt with eight cartels together in a single decision, shows that it is common practice to group together for procedural purposes independent complaints relating to cartel law.

307 The Commission rejects the applicant's arguments.

2. Findings of the Court

308 Under Article 15(2) of Regulation No 17, the Commission may impose on undertakings or associations of undertakings fines of up to 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement.

309 In the present case, the applicant complains that the Commission artificially severed the present case from the sodium gluconate case.

310 It is clear from several recitals of the Decision and of the sodium gluconate decision that in 2001 the Commission imposed two fines on the applicant, as it had infringed the competition rules by taking part in two cartels relating to different products which, although related in some of their applications, constituted two distinct relevant markets. As appears from recitals 34 to 39 of the sodium gluconate decision, citric acid is not a general substitute product, but only a partial substitute for sodium gluconate, depending on the area of application. The Court considers that this assessment by the Commission is not erroneous and that therefore, in such a situation, there were objective reasons — not artificial reasons, as the applicant claims — why the Commission instituted two separate procedures, found two separate infringements and imposed, independently, two separate fines for the two offences.

311 From that point of view, contrary to the applicant's submissions, the Commission acted no differently in the vitamins case. Although, in that case, the Commission joined the procedures relating to the cartels in the vitamins market and adopted a single decision, it nevertheless found separate infringements in relation to each of

the vitamins concerned and sanctioned the undertakings in question by imposing eight separate fines.

312 It must also be observed that, among the five citric acid producers to which the Decision is addressed, only two participated in the sodium gluconate cartel, namely the applicant and ADM. Furthermore, the sodium gluconate cartel existed from 1987 to June 1995, whereas the citric acid cartel lasted only from March 1991 to May/June 1995, and the members of the two cartels had neither a common project nor a common purpose aiming at the coordinated global elimination of competitors from the two markets in question.

313 Lastly, the fact, noted by the applicant, that the United States and the Canadian competition authorities joined the citric acid and the sodium gluconate cases is irrelevant for assessing the legality of the approach taken by the Commission with regard to the limit laid down in Article 15(2) of Regulation No 17.

314 Consequently, the first limb of the plea, concerning the refusal to take account of the fines imposed in the sodium gluconate decision in relation to the limit laid down in Article 15(2) of Regulation No 17, must be dismissed.

C — *Taking into account the turnover of Jungbunzlauer Holding AG*

1. Introduction

315 With regard to taking into account the turnover of Jungbunzlauer Holding AG, the applicant raises pleas alleging, first, infringement of the principle of equal treatment, secondly, of the obligation to state reasons and, thirdly, an error of assessment.

2. Infringement of the principle of equal treatment

Arguments of the parties

316 Jungbunzlauer claims that the Commission failed to observe the principle of equal treatment in that, in order not to exceed the maximum amount laid down by Article 15(2) of Regulation No 17, it took into account the turnover of the Jungbunzlauer group, whereas, in relation to the other two parties to which the Decision was addressed, namely H&R and Cerestar, the Commission did not take account of the turnover of their parent companies or subsidiaries.

317 Jungbunzlauer states that it does not contest the merits of the Commission's calculation in the cases of H&R and Cerestar, even though, in its view, in doing so the Commission departed from the hitherto-applied method of calculation. Referring to the sodium gluconate and the vitamins decisions, Jungbunzlauer submits that the Commission's past practice consisted in including in the calculation of the limit of the fine by reference to the global turnover of the undertakings concerned, as laid down in Article 15(2) of Regulation No 17, the turnover of the group, that is to say, the parent company or companies and the subsidiary companies held by that parent company or companies. Jungbunzlauer submits that the Commission ought to have given it the same favourable treatment.

318 In relation to the treatment of H&R, Jungbunzlauer observes that it is clear from recitals 292 and 293 of the Decision that the Commission took into account only the turnover of the subsidiaries controlled by H&R and that, by reason of that choice, it reduced the fine from EUR 122.5 million to EUR 20.31 million. According to Jungbunzlauer, however, had the Commission applied its previous practice, it would

not have been necessary to make that reduction. Jungbunzlauer infers from recitals 25 et seq., 50, 183 and 243 of the Decision that, in 2000, H&R belonged to the Bayer group which, in the course of that year, achieved a turnover of EUR 30 971 million.

319 With regard to the treatment of Cerestar, Jungbunzlauer observes that the Commission reduced the fine from EUR 4.55 million to EUR 1.75 million, without giving specific reasons. Jungbunzlauer states that it assumes that the Commission proceeded on the basis of Cerestar's turnover, referred to in recital 21 of the Decision. Jungbunzlauer notes, however, that, in 2000, Cerestar belonged to the Eridania-Béghin-Say group which, in the same year, had a turnover of EUR 98 053 million (recital 19).

320 Jungbunzlauer observes that, by contrast, so far as it is concerned, the Commission used the turnover of the Jungbunzlauer group (recitals 50, 185 and 293 of the Decision). According to Jungbunzlauer, however, had the Commission applied to it the same calculation method as for H&R and Cerestar, it would have had to take into account only the turnover of Jungbunzlauer which, as a management company, had only a small turnover (approximately EUR 3.5 million). Applying the 10% maximum, that would have led to a considerable reduction in the fine (approximately EUR 0.35 million). Jungbunzlauer adds that, had the Commission used the turnover of Jungbunzlauer GmbH, to which, in the applicant's opinion, the Decision ought to have been addressed and whose turnover in 2000 was only EUR 197.3 million, the final amount would have been reduced from EUR 29.4 million to EUR 19.73 million.

321 The Commission rejects the applicant's arguments.

Findings of the Court

322 It must be observed that the principle of equal treatment precludes comparable situations from being treated differently or different situations from being treated in

the same way, unless such treatment is objectively justified (see *BPB de Eendracht* v *Commission*, paragraph 88 above, paragraph 309, and case-law cited).

323 In the present case, it is clear from recitals 30, 34 and 187 of the Decision, and it has not been disputed by the applicant, that the infringement was committed by the undertakings which were consecutively responsible for the management of the entire group, namely Jungbunzlauer GmbH and, after the group was restructured, Jungbunzlauer. The senior executives of the Jungbunzlauer group attended the cartel meetings and took decisions on the group's participation in the cartel and its conduct within the cartel.

324 Jungbunzlauer, however, has not even sought to demonstrate that the situation of the two other companies, H&R and Cerestar, was comparable to its own. It has therefore failed to show that in the present case the situation of those two companies was comparable to its own.

325 Consequently, the plea alleging infringement of the principle of equal treatment must be dismissed.

3. Infringement of the obligation to state reasons

326 Jungbunzlauer complains that the Commission failed to provide sufficient detail as to why it did not reduce its fine in accordance with the maximum laid down by Article 15(2) of Regulation No 17. It notes that it was only in the statement in defence that the Commission provided an explanation for the differential treatment of Jungbunzlauer, H&R and Cerestar.

327 The Commission submits that this plea must be dismissed.

328 The Court observes that, in recitals 30 to 34, 187 and 188, the Commission stated the reasons why it had attributed the infringement to Jungbunzlauer as the managing company of the group. An overall reading of the recitals of the Decision shows easily the reasons why the Commission, contrary to what it did in the cases of H&R and Cerestar, did not reduce the fine in accordance with the maximum laid down by Article 15(2) of Regulation No 17. It was therefore under no obligation at all to set out the reasons once again in the part of the Decision relating to the application of the maximum amount.

329 Consequently, the plea alleging infringement of the obligation to state reasons must also be dismissed.

4. Error of assessment in the Commission's failure to take account of the fines imposed in other countries

330 Jungbunzlauer claims that, to calculate the maximum amount of fines under Article 15(2) of Regulation No 17, it is necessary to add the fines imposed on the Jungbunzlauer group in the United States and Canada (EUR 10.9 million) together with that imposed by the Commission (EUR 29.4 million, before application of the Leniency Notice). This gives a total of EUR 40.3 million, which far exceeds the limit in question.

331 The Commission rejects this argument.

332 The Court considers that it is clear from Article 15(2) of Regulation No 17 that the maximum fine laid down therein applies only to fines imposed by the Commission for infringements of the Community competition rules. This interpretation of Article 15(2) of Regulation No 17 is consistent with the findings in paragraphs 285 to 301 above, namely that the Commission did not infringe the *ne bis in idem* principle in fining Jungbunzlauer without taking account of the fine it had already paid in the procedures undertaken in non-member countries.

333 Jungbunzlauer is accordingly wrong in criticising the Commission for not having taken account of the fines levied on Jungbunzlauer in the United States and Canada for the purpose of calculating the maximum fine provided for in Article 15(2) of Regulation No 17.

334 Consequently, this limb of the plea and the plea as a whole must be dismissed.

VII — *Infringement of the right of access to the file*

A — *Arguments of the parties*

335 Jungbunzlauer submits that the Commission infringed its right of access to the entire file in that it based the Decision on certain documents in relation to which the applicant was not heard. Jungbunzlauer submits that, because of those procedural defects, the Decision or at least that part of it which refers to the documents to which the applicant did not have access should be annulled.

336 According to Jungbunzlauer, the Commission is required to give the undertakings concerned access to all the documents in the case in order to allow them to defend themselves effectively against the charges against them in the statement of objections (Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 54, and *Cimenteries CBR and Others* v *Commission*, paragraph 141 above, paragraph 144). The right of access to the file also exists in relation to the replies of the other undertakings concerned to the statement of objections (*Cimenteries CBR and Others* v *Commission*, paragraph 141 above, paragraph 384 et seq.). The right of access to the entire file extends not only to all incriminating documents, but also exculpatory evidence. According to Jungbunzlauer, if the possibility cannot be ruled out that the defence of the undertakings concerned was affected by the fact that they did not have full access to the documents in the case, the decision must be annulled (*Cimenteries CBR and Others* v *Commission*, paragraph 141 above, paragraph 156 et seq.). Referring to the Opinion of Advocate General Léger in Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, I-987, points 119 and 120, and to the order of the President of the Court of First Instance in Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153, paragraph 85 et seq., Jungbunzlauer submits that the requirements relating to proof that incomplete access to the file limited the undertaking's possibilities of defence must not be too stringent.

337 In the present case, Jungbunzlauer complains that the Commission did not disclose to it the replies of Cerestar, H&R, HLR and ADM to the statement of objections. Jungbunzlauer observes that, in footnotes 113 (recital 217), 118 (recital 220) and 119 (recital 223) to the Decision, the Commission quoted extracts from those documents, which related to the implementation of the agreements in practice.

338 Jungbunzlauer submits, however, first, that those documents could have been used in its defence as they supported its own assertions.

339 Secondly, Jungbunzlauer claims that, in recitals 279 and 281 of the Decision, the Commission used against it certain parts of the replies of H&R and HLR to the statement of objections concerning the follow-my-leader role of Jungbunzlauer GmbH.

340 Jungbunzlauer adds that, during the administrative procedure, the Commission asked the parties for non-confidential versions of their replies to the statement of objections. Therefore the Commission could have given the parties concerned access to those documents, without additional administrative costs.

341 The Commission contends that this plea must be dismissed.

B — *Findings of the Court*

1. Introduction

342 The applicant complains that the Commission did not give it access to the replies of other parties concerned to the statement of objections although, on the one hand, in the Decision the Commission used certain information in the replies as incriminating evidence against the applicant and, on the other, certain other information as evidence exculpating the applicant.

2. Incriminating evidence

343 If the Commission wishes to rely on a passage in a reply to a statement of objections or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 81(1) EC , the other parties involved in that proceeding must be placed in a position in which they can express their views on such evidence. In such circumstances the passage in question from a reply to the statement of objections or the document annexed thereto constitutes incriminating evidence against the various parties alleged to have participated in the infringement (see *Cimenteries CBR and Others* v *Commission*, paragraph 141 above, paragraph 386, and case-law cited).

344 It is for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence (*Aalborg Portland and Others* v *Commission*, paragraph 132 above, paragraphs 71 to 73).

345 In the present case, the applicant claims that, in recitals 279 and 281 of the Decision, the Commission used against the applicant certain parts of the replies of H&R and HLR to the statement of objections concerning the role of Jungbunzlauer GmbH in the cartel.

346 In that connection, it must be observed that, after summarising the applicant's arguments relating to the attenuating circumstances on which it considered it was entitled to rely on the basis of its exclusively passive or follow-my-leader role (recitals 275 to 278 of the Decision), and before replying to those arguments (recitals 282 and 284 of the Decision), the Commission summarised the statements of H&R

and HLR in their respective replies to the statement of objections (recitals 279 to 281). In those statements, the parties essentially denied that the applicant had played an exclusively passive or follow-my-leader role within the cartel.

347 However, without it being necessary to consider whether the principles set out at paragraphs 343 and 344 above apply to the analysis not only of the existence of a cartel and membership of it, but also to the setting of fines, it must be observed that, in rejecting the applicant's arguments concerning the benefit of attenuating circumstances on the basis of its exclusively passive or follow-my-leader role, the Commission rightly relied only on the information submitted by the applicant itself in the course of the administrative procedure.

348 In recital 284 of the Decision, the Commission merely observed, in support of its finding, that 'from 1994 onwards Jungbunzlauer took over responsibility for the collection of sales data and that its CEO chaired the cartel meetings suffices to demonstrate that Jungbunzlauer's involvement in the cartel was active and went much further than it acknowledges'. The applicant itself had given the Commission that information in its letters of 29 April 1999 and 21 May 1999.

349 Therefore, the conclusion reached by the Commission in the Decision would not have been different if the replies from H&R and HLR to the statement of objections had had to be discounted.

350 Consequently, this limb of the plea must be dismissed.

3. Exculpatory evidence

351 With regard to the non-disclosure of an exculpatory document, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission. It is sufficient for the undertaking to show that it would have been able to use the exculpatory document in its defence, in the sense that, had it been able to rely on it during the administrative procedure, it would have been able to put forward evidence which did not agree with the findings made by the Commission at that stage and would therefore have been able to have some influence on the Commission's assessment in any decision it adopted, at least as regards the gravity and duration of the conduct of which it was accused and, accordingly, the level of the fine. In that context, the possibility that a document which was not disclosed might have influenced the course of the proceedings and the content of the Commission's decision can be established only if a provisional examination of certain evidence shows that the documents not disclosed might — in the light of that evidence — have had a significance which ought not to have been disregarded (*Aalborg Portland and Others* v *Commission*, paragraph 132 above, paragraphs 74 to 76).

352 The applicant submits, first, that in footnote 113 (recital 217) to the Decision, the Commission referred to the part of Cerestar's reply to the statement of objections in which, on the subject of the implementation of the cartel in practice, Cerestar stated that it had refused to adhere to certain price-fixing agreements and, from January 1992, its prices were always below those of other producers. According to the applicant, those statements by Cerestar could have been useful in its own defence as they support its own arguments concerning the cartel's lack of any real impact on the market.

353 However, the mere fact that Cerestar put forward substantially the same arguments as the applicant with regard to the alleged non-adherence to the agreed rules cannot constitute exculpatory evidence.

354 In the first place, it must be observed that, in recital 218 of the Decision, the Commission rejected the arguments of Cerestar and the applicant on the basis in particular of a statement by ADM annexed to the statement of objections. According to ADM's statement, the applicant played an active role in the cartel and tried to create a degree of stability in the market. In addition, in recital 219 of the Decision, the Commission referred to the Court's case-law which states that an undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit. However, a mere reference to case-law cannot constitute incriminating evidence and, in any event, the case-law is public and accessible, irrespective of the documents in a particular administrative matter.

355 In the second place, the mere fact that ADM and Cerestar relied on the same arguments as the applicant and that one of them used more resources for its defence is not sufficient to regard those arguments as 'exculpatory evidence'.

356 It follows that, even if the applicant had been able to rely on the relevant part of Cerestar's reply to the statement of objections during the administrative procedure, the Commission's findings would not have been influenced as a result.

357 Secondly, the applicant refers to the fact that, in footnotes 118 (recital 220) and 119 (recital 223) to the Decision, the Commission referred, first, to H&R's reply to the statement of objections and, secondly, to an expert report lodged by ADM. Those two documents may, according to the applicant, also have enabled it to develop more detailed submissions of its own concerning the cartel's lack of any actual effect.

358 However, as has already been held above, the Commission relied on several items of evidence, including documentary evidence, and was justified in finding, at recital 226 of the Decision, that, although the arguments put forward in those documents had some value, they did not demonstrate that the cartel had no effect on the market.

359 Therefore, even if the applicant had been able to avail itself of those documents during the administrative procedure, the Commission's findings would not have been influenced by them.

360 In the light of all the foregoing, the plea alleging infringement of the right of access to the file must be dismissed.

VIII — *The effect of the duration of the administrative procedure on the fine*

A — *Introduction*

361 Jungbunzlauer observes that the Decision was adopted almost six and a half years after the infringement came to an end. In particular, the period that elapsed between the end of the infringement and the formal opening of the procedure on 28 March 2000 was very long. According to the applicant, this affected the fine in two ways.

B — *The Commission took account of the turnover for 2000 of the undertakings concerned*

1. Arguments of the parties

362 Referring to the table in recital 50 of the Decision, Jungbunzlauer observes that, in calculating the fine, in order to take account of the size of the undertakings concerned and the categories into which they were divided, the Commission did not take into account the turnover figures relating to the period of the cartel's existence (1991 to 1995), but used those for 2000. Jungbunzlauer states that, since the end of the infringement in 1995, its turnover has increased considerably: in 1995 the Jungbunzlauer group obtained only 76.3% of its present turnover and, from 1999 to 2000, group turnover rose by 13.5%.

363 Jungbunzlauer submits that the Commission's Guidelines state that the Commission will take account of 'the effective economic capacity of offenders to cause significant damage to other operators' (fourth paragraph of Section 1A). In that context, the Commission can only take as a basis the size of the undertakings concerned at the date of the infringement, as that figure is the only one that provides a reply to that question, and their turnover at a later date would not be relevant.

364 In addition, the calculation method chosen by the Commission has the effect of unfairly favouring the undertakings which profited from the cartel and which, after it ended, had to suffer a considerable drop in turnover. In contrast, the undertakings which, like Jungbunzlauer, saw their turnover increase after the end of the cartel have unfairly been put at a disadvantage, which is an absurd result.

365 Jungbunzlauer considers that the Commission is wrong in replying to this argument that, if it had imposed the fine at an earlier date, Jungbunzlauer would have been affected more harshly by the fine. Had the Commission adopted its Decision at a date prior to 2001, the fine would have been considerably lower.

366 The Commission rejects the applicant's arguments.

2. Findings of the Court

367 It must be observed that the application of a multiplier aims to ensure that the fine has a deterrent effect. That effect enables the size and global resources of the undertakings concerned at the date of the fine to be taken into account.

368 Even assuming that, as the applicant claims, the global turnover of the parties concerned grew between the end of the cartel and the year 2000, nevertheless, in applying a multiplier of 2 and 2.5 respectively to the fines calculated for ADM, HLR and H&R, the Commission did not take into account a very exact calculation based on the turnover figures, but asserted that there was a difference in order of magnitude relating to those figures. The applicant does not even claim that this essential difference in order of magnitude changed between 1995 and 2000.

369 Therefore, contrary to the applicant's submission, in relying on the turnover of the undertakings concerned in 2000 to adjust the amount of the fines, the Commission did not infringe the Guidelines or the principle of equal treatment.

370 Consequently, the applicant's pleas must be dismissed.

C — *Commission policy in relation to fines has become harsher*

1. Arguments of the parties

371 Jungbunzlauer claims that, by adopting the Decision and generally in 2001, the Commission sharpened its fines policy considerably. According to Jungbunzlauer, because of the abnormal length of the procedure, the fine imposed on it was the result of the new and harsher practice of the Commission. By contrast, if the procedure had been closed earlier, the applicant would have benefited from the earlier decision-making practice, which was much more advantageous for the undertakings concerned.

372 Jungbunzlauer considers that the abnormally long duration of the procedure is borne out by a comparison with the amino acids and vitamins decisions. According to Jungbunzlauer, those two cases were dealt with far more rapidly than the present case: in the amino acids case, the cartel ended in mid-1995 and the decision was adopted scarcely five years later; in the vitamins case, the cartel ended in the spring of 1999 and the decision was adopted only two years and nine months later. By contrast, in the present case the Decision was not adopted until six and a half years after the agreements finally came to an end. This is all the more surprising since, by comparison with the other cases, the present case was much less complex from both a substantive and procedural viewpoint.

373 Jungbunzlauer argues that, realistically speaking, the procedure in the present case ought to have been completed in two or three years. It also considers that, if the

procedure had been completed earlier, first of all, the criteria chosen would have been much less stringent than those which were applied in adopting the Decision and, second, the Decision could even have been adopted before the publication of the Guidelines, so that the previous method of calculation would have been applicable.

374 According to Jungbunzlauer, the difference in the time taken to deal with those cases can be explained only by the fact that the latter were given a different level of priority. The applicant does not dispute that the Commission may determine priorities according to the importance attached to cases from the viewpoint of competition policy. However, that should not result in an undertaking involved in a lower priority case being fined more than other undertakings involved in higher priority cases. Moreover, proceeding in this way is counterproductive with regard to the deterrent purpose of fines.

375 The Commission rejects the applicant's arguments.

2. Findings of the Court

376 In substance, the applicant considers that if the Commission's investigation procedure had been completed earlier, the applicant would have benefited from an earlier decision-making practice and much less stringent criteria for determining fines. It adds that the Decision might even have been adopted before the Guidelines were published, so that it could have benefited from the previous method of calculating fines.

377 In that respect, the Court observes that the fact that in the past the Commission imposed fines of a certain level for certain types of infringement does not mean that it is stopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy. The proper application of the Community competition rules in fact requires that the Commission may at any time adjust the level of fines to the needs of that policy (see *LR AF 1998* v *Commission*, paragraph 88 above, paragraph 237, and case-law cited). Therefore, the applicant cannot claim the benefit of previous decision-making practice solely on the ground that the decision relating to itself ought also to have been adopted earlier.

378 In any case, the Court finds that the Commission's decision-making practice for determining the fine in the Decision proceeds from the application of the criteria laid down in the Guidelines.

379 The Court adds that, in August 1995, the Commission was informed by the United States Department of Justice that it was conducting an investigation into the citric acid market. In April 1997, the Commission was informed by the United States Department of Justice that the applicant had participated in a cartel in the United States. Lastly, in August 1997, the Commission sent requests for information to the four biggest citric acid producers in the Community, including Jungbunzlauer.

380 In view of the foregoing, the Court observes that the mere communication of information to the Commission by the competition authorities of non-member countries cannot entail an obligation for the Commission to open an investigation. The Commission's general function of supervision in the matter of competition under Article 85 EC does not require the Commission to initiate procedures seeking to establish infringements of Community law (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-252/99 P and C-254/99 P *Limburgse Vinyl*

Maatschappij and Others v *Commission* [2002] ECR I-8375, paragraphs 447 and 448, and Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 74). It follows that no obligation can arise for the Commission to open an investigation procedure on the basis of information provided by the United States Department of Justice.

381 However, although the Commission cannot be required to initiate a procedure as a result of information from competition authorities of non-member countries, it may do so on its own initiative. Accordingly, in the present case the Commission initiated such a procedure shortly after receiving information that the applicant had participated in a cartel in the United States. Therefore, the Court considers that in the present case the Commission cannot be criticised for not having begun to investigate the matter before August 1997.

382 The Court also notes that the applicant considers that an investigation by the Commission lasting two to three years for the present case is entirely realistic.

383 It follows that, even if it were accepted that in the present case the Commission's investigation should not have lasted more than three years, as the applicant claims, the Guidelines published on 14 January 1998 would, in all probability, have been taken into account by the Commission in calculating the applicant's fine.

384 Consequently, the Court considers that the applicant has not shown that, without the alleged delay on the Commission's part in dealing with the present case, the applicant would have benefited from the criteria for determining the fine and, therefore, from the decision-making practice prior to those set out in the Guidelines.

385 Accordingly, the applicant's argument that the principles and practice applied in its case for determining the amount of the fine were more stringent by reason of an alleged delay in the Commission's examination of the case must be dismissed.

386 Since none of the pleas raised against the Decision has succeeded, there are no grounds for reducing the fine by virtue of the Court's unlimited jurisdiction. Therefore, the action must be dismissed in its entirety.

Costs

387 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the defendant and the intervener.

388 Under the first subparagraph of Article 87(4) of those rules, institutions which intervened in the proceedings are to bear their own costs. Therefore the Council, as intervener, is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders Jungbunzlauer AG to bear its own costs and to pay those incurred by the Commission;**

3. **Orders the Council to bear its own costs.**

Azizi Jaeger Dehousse

Delivered in open court in Luxembourg on 27 September 2006.

E. Coulon J. Azizi

Registrar President

Table of contents